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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 699

JOHN A. JOHNSON, PETITIONER,

vs.

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 13, 1938.

CERTIORARI GRANTED FEBRUARY 14, 1938.

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TRANSCRIPT OF RECORD.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 8562.

JOHN A. JOHNSON,
Petitioner, Appellant,
versus

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA,
Respondent, Appellee.

No. 1167 Habeas Corpus.

APPEAL from the District Court of the United States for the Northern District of Georgia, Atlanta Division.

Messrs. Sutherland, Tuttle & Brennan, 1514 First Nat'l. Bank Bldg., Atlanta, Ga., Attorneys for Appellant.

Lawrence S. Camp, Esq., United States Attorney, Atlanta, Ga.,

Harvey H. Tysinger, Esq., Assistant United States Attorney, Atlanta, Ga.,
Attorneys for Appellee.

MOTION TO CONSOLIDATE CASES FOR HEARING AND TO OMIT THE PRINTING OF THE RECORD IN No. 8563.

Filed August 17, 1937.

In the United States Circuit Court of Appeals for the Fifth Circuit.

John A. Johnson
vs. No. 8562.
Fred G. Zerbst.

Monroe C. Bridwell
vs. No. 8563.
Fred G. Zerbst.

Now comes Appellants in the above entitled cases and file their motion for a consolidation of their appeals as follows:

1.

Appellants show that they have both filed separate appeals in this Honorable Court, and that the same are now pending.

2.

Appellants show that they were jointly indicted in the United States District Court in Charleston, South Carolina and they were jointly arraigned, tried and convicted on the 23rd day of January, 1935. The same evidence was used in the conviction of both Appellants.

3.

Appellants show that they filed petitions for the writ of habeas corpus simultaneously to the Court below, which

said Court considered the two petitions together on the same pleadings and on the same evidence. In rendering judgment denying the writ, the Court below consolidated the cases for the purpose of rendering the said judgment and he thus considered the two cases together throughout the proceedings.

4.

Appellants show that both appeals can be properly and adequately considered upon a single record.

Wherefore Appellants respectfully pray that these two cases, to-wit, John A. Johnson v. Fred G. Zerbst, No. 8562, and Monroe C. Bridwell v. Fred G. Zerbst, No. 8563, be heard and decided upon the printed record in the case of Johnson v. Zerbst, and that Appellants be permitted to have the record printed in the Johnson case and be permitted to omit the printing of the record in the Bridwell case, but that separate judgments be entered in the two cases.

(Signed) ELBERT P. TUTTLE,
SUTHERLAND, TUTTLE & BRENNAN,
Attorneys for John A. Johnson and Monroe C. Bridwell.

The foregoing prayer of Appellants is hereby consented to.

(Signed) HARVEY H. TYSINGER,
Asst. United States Attorney.

ORDER.

It is ordered by the Court that the record in only the case of *Johnson v. Zerbst, No. 8562* shall be printed, and that the decision of this Court in said case of *Johnson v.*

Zerbst shall control the decision in the case of *Bridwell v. Zerbst.*

(Signed) RUFUS E. FOSTER,
U. S. Circuit Judge.

New Orleans, La., August 17, 1937.

1a PETITION FOR WRIT OF HABEAS CORPUS.

United States of America in the District Court of the United States, Northern District of Georgia, Atlanta Division.

John A. Johnson, Petitioner,
versus
A. C. Aderhold, Warden, United States Penitentiary, Atlanta, Georgia, Respondent.

No. 1167 Habeas Corpus.

To the Honorable the Judges of the District Court of the United States for the Northern District of Georgia:

The Petition of John A. Johnson, respectfully shows to this Court as follows:

Your Petitioner is actually and unlawfully imprisoned, restrained of his liberty, and detained in the United States Penitentiary, Atlanta, Georgia, under color of authority of the United States, and is in the custody of A. C. Aderhold, Warden of said penitentiary, which is located within the jurisdiction of this Court. The sole claim and authority by virtue of which A. C. Aderhold, so restrains and detains your Petitioner is a commitment of the United States District Court for the Eastern District of South Carolina (hereinafter referred to as the Trial Court) made under the following circumstances:

1. On November 21, 1934, your Petitioner, together with one Monroe C. Bridwell (by whom a similar petition is being filed) was arrested in Charleston, South Carolina, on the charge of possessing and uttering counterfeit money. A preliminary hearing upon such charge was had before the United States Commissioner, after which your Petitioner was bound over by the Commissioner to await the action of the United States Grand Jury, and was confined to jail because of his inability to give bail. Your petitioner was represented by an attorney at the hearing before the United States Commissioner, but upon being informed that your petitioner would be unable to pay him, the attorney withdrew from the case. Your petitioner had at the time, and now has, no property or funds to pay a lawyer to defend or advise him, or to give bail.

2. Upon information and belief: Your Petitioner was indicted by a Grand Jury on January 21, 1935, upon the charge of possessing and uttering counterfeit money. The source of your Petitioner's knowledge and the ground of his belief for this allegation is a statement made to him by the Trial Court when he was arraigned, as hereinafter stated.

3. On January 23, 1935, after having been in jail for two months, your Petitioner was ordered to appear in the Trial Court, when he was for the first time informed that an indictment had been found against him. Without a formal arraignment, he was then asked to enter his plea, and your Petitioner pleaded "Not Guilty."

4. Upon the arraignment referred to in the foregoing paragraph, when your Petitioner pleaded "Not Guilty," the Trial Court asked your Petitioner whether he had an attorney, to which your Petitioner replied in the negative. The Trial Court did not, at this or any other time, offer to appoint an attorney for your Petitioner, or advise your Petitioner that he had a right to have the Court ap-

point an attorney for him. Your Petitioner did not know that he had a right to an attorney, and was not advised thereof until many months thereafter. At no time during the trial, or thereafter until this Court appointed an attorney for your Petitioner as hereinafter stated, did your Petitioner have an attorney to defend or advise him.

5. After your Petitioner had pleaded "Not Guilty," the Trial Court proceeded to impanel the jury. Your Petitioner had no witnesses present and the Trial Court did not ask your Petitioner whether he wished time to prepare his defense or to summon witnesses, nor did the Trial Court advise your Petitioner of his right to compulsory process to secure witnesses. Your Petitioner did not know that he had such a right and, being ignorant, consented that the trial proceed, although he was totally unprepared.

3 6. Your Petitioner on the same day, namely, January 23, 1935, was tried, convicted and sentenced to a term of four years and six months, such sentence being imposed at about 5:30 P. M. During the course of the trial, no objections or exceptions were taken to any of the evidence or any of the proceedings, your Petitioner being unaware of his right to take such objections and exceptions, and no one attempting to preserve any of your Petitioner's rights in his behalf. No witnesses were called on behalf of your Petitioner, except that when your Petitioner testified that he did not know that the bills which he was accused of possessing and uttering were counterfeit, the Trial Court asked him whether he wished a witness called to testify upon this point. Upon your Petitioner replying in the affirmative, a witness was summoned who your Petitioner later learned was a deputy sheriff employed in the office of the Sheriff who caused your Petitioner's arrest, and could not be, and was not, a fair and impartial witness on behalf of your Petitioner. Said deputy sheriff took the witness stand without prior consultation with your Petitioner and testified that he could tell that the bills in question were counterfeit.

7. After your Petitioner had been sentenced, he was remanded to jail where he asked the jailor to call a lawyer for him, but the request was disregarded, and he was not permitted to communicate with a lawyer. Your Petitioner was confined in jail, and held incommunicado from the time he was thus remanded to jail until about 8:00 A. M. on January 25, 1935, when he was transported in an automobile by two United States deputy marshals to the penitentiary in Atlanta, Georgia, where he is now confined. During said trip, he was not allowed to communicate with any one concerning his arrest, trial or legal rights. On arriving in said penitentiary, he was placed in isolation and held incommunicado and was so kept for sixteen days.

8. Your Petitioner is not a resident of the State of South Carolina. At the time of his arrest, he had been in Charleston, South Carolina, only a few days and had no relatives, friends or acquaintances in Charleston. He was a man of little education, having finished only the fifth grade of public school. Your Petitioner has never studied law and is ignorant of the law and has never previously had any Court experience. Your Petitioner did not know of his constitutional rights and did not know that after his trial he had a right to move for a new trial or to appeal and was not at any time informed of these rights until many months after the trial.

9. On May 15, 1935, your Petitioner, having been informed by a fellow prisoner of his right to appeal, filed a petition for appeal, with the assistance of such fellow prisoner, in the office of the Clerk of the Trial Court. On May 20, 1935, your Petitioner was advised by the Clerk of the Trial Court that the appeal could not be allowed because it had been filed too late.

10. In June, 1935, your Petitioner filed a petition in this Court, prepared with the assistance of a fellow

prisoner, for a writ of habeas corpus. This Court allowed such petition, and, learning of the circumstances, appointed Frank A. Doughman, an attorney practicing in Atlanta, Georgia, to represent your Petitioner. On December 19, 1935, this Court denied said petition for habeas corpus, upon the ground that although your Petitioner had been deprived of his right to counsel and of his right to compulsory process to secure witnesses and had thereby been deprived of his liberty without due process of law, the Court had no jurisdiction to order your Petitioner's discharge by a writ of habeas corpus.

11. Your Petitioner is innocent of the offense of which he has been convicted and could have proved his innocence if the Trial Court had appointed an attorney for him to prepare and conduct his defense and had given him a fair trial. Your Petitioner has never been guilty of, and has never before been charged with, any offense.

Your Petitioner alleges that by reason of the foregoing, he was denied the right to counsel for the trial of his case, that he was denied the right of compulsory process to secure witnesses, and that he has been deprived and continues to be deprived of his liberty without due process of law.

Wherefore, your Petitioner prays that a Writ of Habeas Corpus may issue, directed to A. C. Aderhold, Warden of the United States Penitentiary, at Atlanta, Georgia, to bring and have your Petitioner before this Court, at a time to be determined by this Court, together with the true cause of his detention, to the end that due inquiry may be had in the premises, and that this Court may proceed in a summary way to determine the facts and the legality of your Petitioner's imprisonment, restraint and detention, and thereupon to dispose of your Petitioner as law and justice may require.

JOHN A. JOHNSON,
Petitioner.

State of Georgia,
Fulton County, ss.

Personally before me, the undersigned officer authorized by law to administer oaths, appeared John A. Johnson, who being first duly sworn, deposes on oath and says that he has read the foregoing Petition, that he knows the contents thereof, that the statements therein made are true, except as to such matters as are stated upon information and belief, and these he verily believes to be true, to the best of his knowledge, information and belief.

JOHN A. JOHNSON.

Sworn to and subscribed before me, this 28th day of November, 1936.

M. E. ALEXANDER,
Notary Public, State at Large,
(Notarial Seal) Georgia.

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6 ORDER GRANTING WRIT.

Read and considered. Let the writ issue as prayed, returnable before me at Atlanta, Georgia, at 10:00 o'clock a. m., on the 19th day of December, 1936.

This the 16th day of December, 1936.

E. MARVIN UNDERWOOD,
U. S. Judge.

Filed December 16th, 1936.

AMENDMENT TO PETITION.

(Title Omitted.)

Comes now the above named petitioner, with leave of the Court, and amends his petition in the above stated

cause, by striking the name of A. C. Aderhold, Warden, and substituting therefore, Fred G. Zerbst, as Respondent.

SUTHERLAND, TUTTLE & BRENNAN,
Counsel for Petitioner.

ORDER ALLOWING AMENDMENT.

The foregoing amendment to the petition is allowed and ordered filed.

This the 1st day of April, A. D. 1937.
E. MARVIN UNDERWOOD,
U. S. Judge.

Filed April 1st, 1937.

---

7 ANSWER.

(Title Omitted.)

Now comes the respondent in the above entitled proceeding, and in obedience to the writ of habeas corpus, produces the body of the petitioner at the time and place directed therein, and for cause of detention respectfully shows that he holds the petitioner under and by virtue of a warrant of commitment issued by the District Court of the United States for the Eastern District of South Carolina, a copy of which is hereto attached and made a part of this response. For answer to the petition, in corresponding paragraphs, respondent states that:

1.

The allegations of paragraph number one are admitted with the exception of the allegations that petitioner's at-

torney, who represented him before the United States Commissioner, withdrew from the case because petitioner was unable to pay him, and further, that at the time of the trial and at this time, petitioner has no property or funds to pay a lawyer to defend or advise him, or to give bail. For want of sufficient information, these allegations are neither admitted nor denied.

2.

Paragraph two is admitted.

3.

Paragraph three is admitted with the exception that for want of sufficient information, respondent is unable to either admit or deny that upon petitioner's appearance at his trial, he was for the first time informed that an indictment had been found against him; and also with the further exception that respondent denies the allegation that petitioner was asked to enter his plea without a formal arraignment. Respondent says that by the settled definition of the term "arraignment," petitioner was lawfully arraigned in said Court, and that whatever want of formality attended said arraignment did not affect the substance of the arraignment, or render it insufficient in law.

8

4.

For want of sufficient information, respondent neither admits nor denies the allegations of paragraph four. Resonent does deny, however, that any duty rested upon the Court to appoint an attorney to represent petitioner, and that petitioner "had a right to have the Court appoint an attorney for him."

5.

For want of sufficient information, the allegations of paragraph five are neither admitted nor denied. Re-

spondent further adds, however, that during the trial of petitioner, either he or his co-defendant made a suggestion to the Court that he would like to have some expert testimony upon a certain point. Thereupon the Trial Judge sent for a certain qualified witness by the name of Boinset, and adduced his testimony in open Court. Respondent says that other than this witness, no request was made by petitioner or his co-defendant for the production of any other testimony in the case.

6.

Paragraph six is admitted with the exception of the allegation that during the course of petitioner's trial, no objections or exceptions were taken to any of the evidence or any of the proceedings, and for want of sufficient information, respondent is unable to either admit or deny this averment.

7.

For want of sufficient information, respondent is unable to either admit or deny the allegations of paragraph seven except the averment that upon petitioner's arrival at the penitentiary, he was placed in isolation and held incommunicado for sixteen days. Respondent says that it is true that upon arrival in the penitentiary, all convicts are placed in quarantine for several weeks as a precaution against the introduction of disease into the prison, but during this period, the prisoners are idle and not assigned to any work details, and pens, pencils and stationery are available to them, and they come in contact with prison officials more frequently than at any other time in their incarceration, and have more opportunities to make inquiries and ascertain from officers
9 and employees of the penitentiary what their rights may be. The use of the mails and even telegraph facilities are permitted to convicts during this

period, not necessarily as a matter of right, but upon request of the Warden and a showing that it is desired to send a communication in connection with the prisoner's criminal case or an appeal therefrom. Therefore, during the quarantine period, it is possible for a convict to attend to legal matters and handle correspondence pertaining to his case or an appeal therefrom with greater facility than at any other period of his incarceration.

8.

For want of sufficient information, respondent can neither admit nor deny the averments of paragraph eight.

9.

Respondent admits paragraph nine.

10.

Respondent admits paragraph ten.

11.

For want of sufficient information, the averments of paragraph eleven are neither admitted nor denied. Respondent does say, however, that the verdict of the jury finding petitioner guilty creates a presumption that its action was correct, and that petitioner was not innocent of the charge as he claims.

12.

Further answering the allegations of the petition, and particularly the complaint that petitioner was placed on trial "without a formal arraignment," respondent says

that the record of conviction, or judgment roll recites that petitioner waived arraignment and pleaded not guilty on January 23, 1935. Petitioner is therefore, estopped from setting up matter contradicting the record, and said record imports absolute verity until set aside in a direct proceeding for that purpose.

13.

Respondent further states that, in his opinion, considering all the evidence available, neither petitioner nor his co-defendant were so illiterate or of such little learning as to be incapable of conducting a defense of said criminal case. On the contrary, the defense and conduct of the trial was particularly well presented in view of the fact that petitioner and his co-defendant were laymen. The handling of the case showed considerable astuteness and knowledge of Court procedure. Either petitioner or his co-defendant examined witnesses, and according to the best recollection of those available as witnesses, one of said co-defendants addressed the trial jury at the conclusion of the evidence. One of said defendants availed himself of the privilege of testifying in his own behalf, but the other did not. Respondent further says that the District Attorney, out of consideration of lack of counsel on behalf of the said defendants, was unusually diligent to preserve every right, Constitutional or otherwise, of these defendants, and exercised every precaution to prevent an error in the progress of the trial which might be prejudicial to the defendants, even much more so than had they been represented by a lawyer. And respondent further says that so far as he can discover, no error did occur during said trial, and that said criminal trial was fairly and impartially conducted.

14.

Answering the charge that petitioner had no witnesses present at said trial, and that none were called on his

behalf, respondent says that the fact is that no request was made of the Clerk of Court for compulsory process for summoning witnesses, nor to the Trial Judge or prosecuting attorney. Nor was a motion for continuance made until witnesses could be secured by the defense, nor was any claim made to the Trial Court nor is made at this time that there are, in fact, witnesses in existence by whom the innocence of petitioner may be proved.

15.

Answering the complaint that petitioner was somewhat promptly removed from Charleston, South Carolina, to the United States Penitentiary, at Atlanta, Georgia, by two Deputy U. S. Marshals, that he was held incommunicado, that later he learned of his right to appeal, and did file an appeal too late, respondent says that no notice of an appeal was filed with the Clerk of Court as is required by the new rules for taking appeals in
11 criminal cases, nor was any other responsible officer of the Court informed that petitioner wished to appeal his case. Furthermore, there was nothing irregular or unusual in transporting a prisoner to the penitentiary within two days after sentence, and such is the normal and ordinary practice in the Eastern District of South Carolina. The petition does not disclose that petitioner asked anyone for permission to have a consultation with an attorney, or that he objected in any way to a prompt removal to the penitentiary, or that he informed either the Deputy U. S. Marshals or any other officer that he desired transportation to the penitentiary delayed in order that an appeal might be perfected. The appeal which petitioner ultimately attempted to file, having been presented after the expiration of five days from date of sentence, the Trial Court was, therefore, without jurisdiction to entertain the same, and there was nothing to do except to refuse to allow the appeal.

Respondent further says that the facts as set out in the petition wholly fail to constitute a cause of action which

would afford petitioner relief on habeas corpus, and that his only remedy, if he be justly entitled to any, is by way of executive clemency.

Wherefore having fully answered, respondent prays the judgment of the Court in the premises.

LAWRENCE S. CAMP,
United States Attorney.
HARVEY H. TYSINGER,
Assistant U. S. Attorney.

GORDON DEAN,
Special Assistant to the
Attorney General.

State of Georgia,
Fulton County.

Personally before me, the undersigned officer authorized by law to administer oaths, appeared A. C. Aderhold, who being first duly sworn, deposes on oath and says he is Warden of the United States Penitentiary at Atlanta, Georgia, that he is the respondent in the foregoing response, and that the statements therein contained are true to the best of his knowledge, information and belief.

A. C. ADERHOLD.

12 Sworn to and subscribed before me, this 15th day of Jany., 1937.

M. O. HOLLIS,
Notary Public, Georgia, State
(Notarial Seal) at Large.

13 SENTENCE.

District Court of the United States of America, Eastern District of South Carolina.

January Term, 1935.

Present, Hon. Frank K. Myers, District Judge, Presiding.

The United States
vs. 10,249.
John A. Johnson.

Indictment for Vio. Secs. 265 and 550, Title 18, U. S. C.

The sentence of the Court is that the Defendant, John A. Johnson be imprisoned in the U. S. Penitentiary, Atlanta, Ga., for Four (4) Years and Six (6) Months.

FRANK K. MYERS,
U. S. Judge, Eastern District of South Carolina.

R. W. HUTSON,
Clerk, D. C. U. S. Eastern District of South Carolina.

To U. S. Marshal for the Eastern District of South Carolina:

You Are Hereby Commanded to take into custody the Defendant and cause him to undergo the above sentence of the Court.

Witness my hand and seal of the said Court at Charleston, S. C., this 23rd day of January, A. D. 1935.

R. W. HUTSON,
Clerk, D. C. U. S. Eastern District of South Carolina.

I hereby certify that the herein named John A. Johnson entered upon the service of the above sentence this Jan. 23, 1935, in the Charleston County Jail.

WM. BURGUSON,
U. S. Marshal, E. D. S. C.

14 United States Marshal's Office.

Atlanta, Ga., January 25/35.

To Warden United States Penitentiary,
Atlanta, Ga.

Sir:

You will commit the within-named J. A. Johnson, to the Jail of your County and confine him in accordance with the terms of the within sentence of the United States District Court.

WILLIAM F. BURGUSON,
U. S. Marshal Eastern District of South Carolina.

Filed Jan. 16, 1937.

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15 JUDGE'S CERTIFICATE AS TO EVIDENCE.

The United States of America, in the District Court of the United States for the Northern District of Georgia, Atlanta Division.

No. 1167—Habeas Corpus.

John A. Johnson, Petitioner,
vs.
Fred G. Zerbst, Warden, United States Penitentiary, Atlanta, Georgia, Respondent.

I, E. Marvin Underwood, Judge of said Court, do hereby certify that in the trial of the above said case the evidence was introduced as follows:

First, pleadings which were filed, composed of the petition and response.

Second, stipulation of counsel that this case and the case of Monroe C. Bridwell, No. 1166, are being tried together and that the evidence introduced applies in both cases.

Third, the indictment in the Eastern District of South Carolina in the Federal Court (Exhibit A). Verdict in the same Court (Exhibit B). Sentence in the same Court (Exhibit C). Commitment (Exhibit D).

Fourth, the depositions taken in the Eastern District of South Carolina as follows:

16 Pursuant to a notice to take depositions on behalf of the respondent, dated July 16th, 1935, in both of the above entitled causes, said depositions being taken in accordance with Sections 639 to 641 inclusive, titled U. S. C. A., and the said notice in both causes having been served upon the counsel for the petitioners by Counsel for the respondent on the 16th day of July, 1935, and Counsel for the Petitioners acknowledging service upon said notices and waiving time of service and all other and further service, further consenting that the depositions be taken as to both causes in one set, and be transmitted according to law to the Clerk of the U. S. District Court, Northern District of Georgia, and there be used upon the hearing in the said matter before the Court in both of the above entitled causes.

Now, in accordance with said notices hereto attached, on the 27th day of July, 1935, at 10 o'clock a. m., in the Federal Building at Charleston, S. C., the said depositions were taken before Doris C. Appleby, a Notary Public for South Carolina.

By agreement of Counsel, the hearing was removed from the District Attorney's office to the Court room of said Federal Building.

Appearances:

Frank A. Doughman, Esq., for Petitioners.

H. H. Tysinger, Esq., Assistant U. S. Attorney for the Northern District of Georgia, and H. T. Nichols, Esq., Special Attorney, Department of Justice, for Respondent.

For Respondent.

RICHARD W. HUTSON, being duly sworn deposes and says:

Petitioners' Counsel:

I ask that the customary rule of excluding witnesses be invoked.

Claud N. Sapp, U. S. Attorney for the Eastern District of South Carolina, who is a proposed witness, does not concede that the right to segregate witnesses, as both he and his assistant are government representatives. However, we have no objection to them being segregated. If it is the desire of the respondent, we will be glad to be segregated.

17

Direct Examination.

My name is Richard W. Hutson. I am Clerk of the U. S. District Court for the Eastern District of South Carolina. I was Clerk of the Court in the latter part of 1934 and first part of 1935. I was January 21st and 23rd, 1935. I recall the trial of the cases of U. S. v. Monroe C. Bridwell and John A. Johnson, not in every detail, however. I think I was in the Court room all the time the trial was going on. Our practice in this Court, where a formal arraignment is not had, is to have the defendant sign a plea of not guilty, and the arraignment is not had. That is the usual course in this Court, unless demand is made for formal arraignment, which is seldom, exceed-

ingly rare. The defendants did not make a demand for formal arraignment. The petitioners in this case, Monroe C. Bridwell and John A. Johnson, positively made no demand for any subpoenas for witnesses in their behalf at any time before the trial or at the trial. I have checked in the office and find no request was made for any subpoenas.

Petitioners' Counsel:
I object to anything except what the witness knows of his own knowledge.

There is no record on the criminal docket of the Court showing entry of any subpoenas for witnesses for the defendants, nor did they make demand to me personally. I can't speak with absolute positiveness, but I recall no request at any time at the trial or before the trial of those cases. I cannot say positively, but sometimes the Judge asks the question as to whether the defendants have counsel, and sometimes the Clerk does as a matter of keeping the record straight. I don't recall the defendants requesting Counsel to represent them in the case. I wouldn't say positively the Judge refused Counsel to the defendants.

18

Q. Now, Mr. Clerk, what is the procedure in this Court, and was it applied to the defendants in committing them to the penitentiary after the sentence?
A. The commitment follows as a matter of course after the conviction of the defendant, and is usually issued the same day that the trial was had or a plea of guilty entered. I do not personally make out the commitments. They are made out by a deputy clerk in the office. I looked at the original record this morning, and I find the commitment in the record, in this case. There is no record of an appeal so far as I can find in this case. I have never heard anything about an appeal in this case before. My record shows here they were sentenced the same day, after a verdict of guilty by the jury. These are just my

rough minutes. I didn't hear any statement in open Court then that they wanted to file an appeal. I was there when the verdict was returned. I was in Court when the sentence was pronounced. I was present when these defendants presented themselves in this Court. My recollection is that Johnston conducted the defense for himself. He acted as attorney for himself and Mr. Bridwell and he addressed the jury. I have my notes here. I have it in my notes that he addressed the jury. I don't recall at any time during the trial either of the
19 defendants asking me or the Court in my presence, to have Counsel appointed to represent them. I recollect Mr. Johnson represented himself and his co-defendant. My recollection is that Mr. Johnson conducted his defense about as well as the average layman usually does in cases of a similar nature. The impression made on me was he was conducting the defense for the benefit of both defendants.

(Objection by petitioners' counsel to that question.)

He showed some familiarity with legal procedure in questioning the witnesses. I think he showed some astuteness.

Cross Examination.

I have been Clerk of the Court for thirty-two years. The trial was conducted in this Courtroom, in which this testimony is now being taken. The chair I sat in was on the side of the desk, and from the bench here to the jury box is about eight feet.

20 CLAUD N. SAPP, being duly sworn, testified as follows:

Direct Examination.

My name is Claud N. Sapp. I am United States Attorney for the Eastern District of South Carolina and have

been since July 5th, 1934. As such official of the government, I was in charge of the prosecution of Monroe C. Bridwell and John A. Johnson, who, by the record shown, were prosecuted and convicted in January, 1935. I was in charge of the United States Attorney's office in directing the prosecution at that time. Neither of the defendants asked me at any time to have the Court appoint counsel. The defendants did not at any time during the trial of the case, or before, ask me to have witnesses subpoenaed for them. The defendants plead not guilty when the case was called. They were arraigned in the ordinary manner as other defendants are. They did not insist on a formal arraignment. They signed a plea of not guilty as is the form of this Court with all defendants. I have never seen anyone else arraigned in any different manner. They were simply called to the bar by the Court and asked whether they plead guilty or not guilty. They stated they were not guilty, and then the Court directed the Clerk to have them sign their plea, which they did. The trial then proceeded. The procedure in this Court is that the Clerk has a boy draw the names of the jurors from a hat. He puts his hand in the hat and pulls out a name, and as the names are called out by the Clerk, the juror presents himself. He is first presented to the government, and if the government accepts him, he is presented to the defendant, and the defendant either rejects or accepts him.

21 Yes, and the defendant accepts them or rejects them, separately. They put the names of all the venire in a hat on individual slips, and a young boy six or eight years old, selected by the Clerk, reaches in the hat without looking, pulls out a name, and hands it to the Clerk. The Clerk calls out the name and the juror walks around in front of the Court here, and the Clerk presents him to the government. If the Government objects, of course the jurors is excused. If the government accepts him, he is presented to the defendant. If the defendant accepts him, he is sworn and takes his seat on the panel. That procedure is followed until 12 are selected. After the 12 are selected, the Court then selects one and desig-

nates one of the 12 as foreman of the jury. The Court advised the prisoners as to how many strikes they had. I don't think they struck any jurors. I don't think they objected to any juror. I might possibly be mistaken, but my recollection is they didn't make any objection. At no time did either one of these fellows even suggest that they wanted counsel or witnesses, nor make any such suggestion to the Court. I asked them, the Court asked them, were they ready to go to trial at the time they entered their plea and signed the plea there, and they stated they had been confined in jail here in Charleston for a considerable period. I have forgotten how long. And it was my understanding that they wanted to be tried in order to get out of jail—in order to get whatever punishment they were going to get or go free. It was my understanding from them. They didn't tell me, but that is the information I got. I think Mr. Joe Fromberg, a lawyer of the Charleston Bar, had represented them at some preliminary hearing before the U. S. Commissioner here, and he advised me he didn't represent them further. (Objection.)

I am going to put before the Court or tribunal hearing this case an explanation of my position. The reason that I called Mr. Fromberg, I had been informed that he had previously represented these people. I was not at the Commissioner's hearing. I did not ask Mr. Fromberg about anything that happened at the Commissioner's hearing. I simply say as a matter of courtesy I called him to know if he represented these people, as is my invariable custom. If I think a prisoner has an attorney, I will not try the case without communicating with him. I called Mr. Fromberg to determine whether he represented them at that time. I will state that in the trial of these defendants, I was particular to see that they had a fair and impartial trial in accordance with the rules of evidence and the law applicable to their case, as I understood, it being my custom, where defendants do not have attorneys. (Objection.)

I did in this case because of the fact that they did not have Attorneys, and was particular to see to it that they had a fair trial, as I understood the law to be. In the examination of them, in their cross examination, and in the presentation of the testimony for the government, I didn't introduce or allow anything to be proven that was even questionable under the law, as far as the propriety of the evidence was concerned.

(Counsel for the government in these cases insist that an irregularity is charged by the petitioners as a fact and not an opinion.)

After the defendants were arraigned and on trial they represented themselves. One of the men, Mr. Bridwell, I believe, took active charge of the case and appeared to be very familiar with the law and procedure in the trial of criminal cases. He cross examined the government's witnesses, presented himself to testify, and he represented his co-defendant, Johnson, as I recall. In other words, he took charge of the case, and as I stated, appeared to have some considerable knowledge of the handling of witnesses on the stand. My recollection is that it was Bridwell that had charge of it. Whichever one had been in the marines was the boy that took charge, and he as I recall was named Bridwell. My recollection is both defendants took the stand and testified. The one in charge of the case, when the other was on the stand, his co-defendant, examined him both on direct and re-direct. My recollection is that one of them addressed the jury. However,
as to that I am not right positive. I addressed
23 the jury for the government. I stated that is my
recollection, that one of them addressed the jury. As an attorney, I have been practicing law 25 years. I began the practice of law in I believe June, 1911. As an attorney of that experience, I stated the defendant surprised me with the familiarity that he exhibited with the rules of evidence and procedure in the trial of cases.

As to his being an ignorant man, not versed in any learning at all as alleged in his petition, I consider him a man of extraordinary ability in the handling of his case in the Courtroom if he is not a lawyer. I don't know whether he is a lawyer or not. Neither one of the defendants, nor anyone in their behalf ever mentioned anything to me, or made any request for the subpoenaing of witnesses. The record will show when the Judge pronounced sentence after they were convicted. I don't recall whether it was that same day. As to these men asking me at any time anything in relation to filing an appeal from the verdict of the jury,—judgment of the Court, or at any time sending word to me, or my receiving word from them, or Bridwell and Johnson in person requesting or saying anything to me in connection with an appeal to be taken, I have never heard directly or indirectly one single thing from them since the jury rendered its verdict, until I was requested to come down here to testify. I don't know anything about their commitment and transportation to the Atlanta Penitentiary three days after that. I do not know of my own knowledge about any appeal that they sent over here about May 10th from the Atlanta penitentiary of the case to the Judge of this Court. I heard this morning that they had sent some appeal over and the Judge refused to accept it on the ground that he didn't have jurisdiction. I certainly don't know anything about it other than what I learned this morning by hearsay—that some proposed appeal had been presented to the Judge of this District.

Cross Examination, (Mr. Sapp).

I was appointed U. S. District Attorney and think I was commissioned July 5th, 1934. I had been
24 District Attorney from July 5th until whatever date this trial took place. On January 21st, I was District Attorney at the time this bill of indictment was found. As to notifying these two men, Monroe C.

Bridwell and John A. Johnson, at the county jail that they had been indicted under Section 9265 and 550 of Title 18 U. S. C. A., I will tell you just what I did do. I notified them in this way: Let me explain. It is the custom in this Court, when prisoners are confined in jail and unable to furnish bond, preference is shown to such prisoners in the trial of their cases in order that they might not be left in jail until another term of Court, 3 or 4, or 5 months. I don't know whether that is done in all jurisdictions. I only have charge of this jurisdiction. In this case, I asked these men if they were ready to go to trial.—When they were brought in, I don't know whether it was the 23rd or not. I don't remember whether it was the morning of the 23rd—probably it was. I had never seen these men myself; I never heard of them. Under a comparatively recent statute of the United States, an accused is entitled to a free copy of the indictment, provided he requests it. He did not request it of my office nor from me. He wasn't furnished a copy of the indictment by me because he didn't ask for it. On the morning they were brought here by the Marshal, they weren't placed in the two chairs, beside the jury box, as I recall, until after the trial started, or about the time they were ready for trial. They were in that room outside there probably. When the case was sounded, I simply arose as is the custom and directed the attention of the Court to the case by number, whatever the number was on the docket. I called the attention of the Court to that case and stated that the Government was ready for trial. Judge Myers was on the bench and Clerk Hutson was here. The prisoners were not called here directly before the desk of Mr. Hutson, the Clerk, and asked whether or not they would plead guilty or not guilty. I am going to tell you what happened. They were called up by the Court, and the Court asked them if they were ready to go to trial. They announced "yes." They then came around in front of the bar and the Court asked them if they wanted to plead guilty or not guilty. The Court asked them, as I recall it. I may

be in error about that, but I know the custom is that the Judge does. My recollection is that the Judge asked them. I may be in error. The Clerk may have asked them. However, they were asked and said they wanted to plead not guilty, and the Judge said "Mr. Clerk, take their pleas." And he laid the indictment up and they signed it. *The Judge asked them if they had a lawyer, and they said "no." He asked them if they were ready to go to trial, and they said "yes."* As I recall, the Judge said, "Mr. Clerk, give us a jury." And we proceeded to draw a jury. The Judge asked them within my hearing if they had counsel. With regard to the Court knowing that they had no counsel, he was bound to know it. The case was tried here. The Court did not ask them, these defendants, whether they wanted Counsel. I did not ask them. Absolutely they did not ask me if they might have counsel appointed. As to one of them asking me and my saying that in the State of South Carolina there was no provision made for paying Counsel appointed by the Court, I did not, positively. When the men proceeded to trial, they sat either here, I think, or there, at the end of this table, as I recall it. (Objection.) After the jury had found them guilty, I was present when the Judge passed sentence. I don't recall what time of day it was. Under the rules, they would have had as I understand 5 days, which is a new rule that has been adopted by the Circuit Court of Appeals, in which to have filed an appeal to the Circuit Court of Appeals. The rule speaks for itself. I had knowledge of that rule, being District Attorney. I did not tell either of these men of their rights and I do not know of anybody else who did, I did not tell these defendants about the rule in regard to filing a motion for a new trial three days from date of sentence. I never heard of the men any more from the time they were sentenced. As to my having no recollection of either of them asking me about the subpoenaing of any witnesses, it isn't a question of recollection. I am positive they did not, because I certainly would have had the witnesses subpoenaed

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or done all I could to have them subpoenaed, or postponed trial if these men had requested me to do that. I didn't suggest to the Court, that these men being charged with a crime which might involve a fine of $5,000.00, and imprisonment in the penitentiary for 15 years, that they be appointed Counsel by the Court, and in view of the seriousness of the crime, that they be furnished counsel. The Court took the indictment and read it, every charge in it, to both of the defendants, and asked them did they understand what they were being charged with, and they said they did. The Court, however, read the indictment aloud to them standing up here, and told them of the effect of a conviction on this indictment, and asked them if they understood it, and they said "yes." In addition the Court read aloud the indictment to them so as to acquaint them thoroughly with the charge. The Judge's name is Frank K. Myers. He resides here. I do not know whether he was here yesterday. With regard to seeing him yesterday, I was not here myself. I do not know where he is this morning. I do not know whether he had notice that his testimony was to be taken this morning, since the writ was filed in Atlanta. I haven't seen him, corresponded with him or communicated with him over the telephone since the writ was filed in Atlanta. The last time I saw the Judge was at the law conference in Asheville sometime in the early part of June, when the fourth circuit law conference was held in Asheville. There has been no Court since. (Objection.) As shown by the records, Monroe C. Bridwell filed an appeal in case No. 10249, and it was received in the Clerk's office May 15th, 1935, and a similar appeal was filed by John A. Johnson in the same case on the same day. I have not seen the appeal filed by Monroe C. Bridwell and John A. Johnson. I do not know anything about the letter that was addressed to Mr. Bridwell and the one to Mr. Johnson by the Clerk as follows:

27

"Charleston, S. C., May 20th, 1935.
Mr. Monroe C. Bridwell,
P. O. Box 1733,
Atlanta, Georgia.

Sir:

U. S. v. Monroe C. Bridwell and John A. Johnson, Violation of Sections 265 and 550 of Title 18, U. S. C. A, Indictment 10249. His Honor Frank K. Myers, the presiding Judge of this Court, directs me to write you and acknowledge receipt of your petition for a new trial in this cause, and in the event same is refused, have an allowance of appeal to the U. S. Circuit Court of Appeals, and further to say that the petitions are refused for the reason that the Court is without jurisdiction in the premises."

The date of that letter is May 20th, 1935. I do not know anything about these appeals or this letter. As to having anything to do with the removal of these two accused men so soon from Charleston to the Atlanta penitentiary, so soon after their conviction and sentence, I didn't know anything about it after sentence. I didn't communicate with the Marshal or anything.

Re-Direct Examination, (Mr. Sapp).

I did not ask them or the Marshal, or any officer to hold them here for more than three days. I did not ask them to be sent on in three days. With regard to these men, when they were brought before the bar and before the trial of their cases, ever making a request of me or the Clerk of the Court for a continuance of their cases, as I stated before in my testimony, they stated they were ready to go to trial. Never at any time did they suggest to me that they wanted a continuance. The fact is, my impression was that they wanted to go to trial and get out of jail and get the matter ended—if con-

victed to start serving the time, or if acquitted, to get out of jail In response to the cross examination, my home is not in Charleston, it is in Columbia. The 28 record will show when we had the last term of Courts in this District. The last term we had here was the latter part of May. And that is the reason I haven't seen Judge Frank K. Myers since the law conference. I saw him when we had Court in Charleston, and I saw him in Asheville. With regard to my statement that I didn't know anything about the appeal that was dated May 10th and sent down here on May 20th from Atlanta by these petitioners, my Assistant largely handles the business in Charleston while the Court is not in session. I come here occasionally, as often as necessary when Court is not in session. Ordinary business affairs which do not require my presence my Assistant can handle. In addition to that, I have an office in Columbia which handles war risk insurance cases.

Re-Cross Examination, (Mr. Sapp).

Mr. Shimel told me my testimony was to be taken last Saturday and I prepared to come last Saturday and he phoned me on Friday, I believe, not to come, that it had been postponed until today, and I told him I would be here.

(Mr. Tysinger, of respondent's counsel, stated he wants the record to show, if it does not already show, that the witnesses were excluded over the objection of the witnesses themselves and over the objection of the government.)

(Mr. Sapp then stated that he did not concede the right of Counsel to segregate the witnesses, certainly the U. S. Attorney and the Assistant District Attorney, but we made no objection,—we had no objection to being segregated.)

(Mr. Tysinger then stated that the government does not concede it.)

29 LOUIS M. SHIMEL, being duly sworn, deposes and says:

Direct Examination.

My name is Louis M. Shimel. I am Assistant District Attorney for the Eastern District of South Carolina. As such, I reside in Charleston, S. C. I recall the cases of John A. Johnson and Monroe C. Bridwell that were tried in this Court, as the record shows, for counterfeiting or passing counterfeit money, in January of this year.

I will tell or put on the record just such facts as took place in the conduct of those trials, or that joint trial of both defendants in regard to the regularity of the trial. The defendants had a hearing before the U. S. Commissioner, and they were held by him for the grand jury. The grand jury indicted them, and they were tried by a petit jury and convicted and sentenced. I don't remember the exact date of this trial. It was sometime in January. The hearing before the commissioner was sometime in November, 1934, some two months before the trial here. I was present at the hearing in the Commissioner's Court. The defendants were represented by counsel in the Commissioner's Court. (Objection by petitioner's counsel.)

Their counsel was Joseph Fromberg, Esq. Under the rules in this district, the commissioner does not hear any witnesses for the defense, so they had no witnesses there. Counsel cross-examined the government's witnesses thoroughly. The defendants, of course, both of them were present. I know of no irregularity in the trial in this Court, the joint trial of both defendants, John A. Johnson and Monroe C. Bridwell in the conduct of the U. S. Attorney towards the defendants. Both Mr. Sapp and I were present and participated in the trial of the case.

The defendants did not ask me to have or see about having attorneys appointed for them. They did not ask me or make a request of me, either in person, by letter, or by messenger, or any other way of communication, to have witnesses subpoenaed for them in their behalf. They did not move for a continuance when they were called before the bar on the trial of the cases. In respect to being ready, they were called before the bar and they plead not guilty, and they signed a plea of not guilty and proceeded with the trial of the case. One of the defendants displayed a great knowledge of Court procedure. He cross examined the witnesses, and in my opinion displayed more knowledge than—(Objection by petitioner's counsel.) In my opinion he displayed more knowledge than the normal layman would know of procedure in the trial of cases. He cross-examined the government's witnesses. I don't recall whether he addressed the jury or not. I wouldn't say yes or no, I don't recall it. My impression is that one of the men, the one who had been in the marines,—I think it was Bridwell, talked to the jury, but I am not sure of it, and couldn't swear to it. In regard to the Judge calling them before the bar when their cases were called, as to whether or not they announced they were ready for trial, I don't recall any specific words that were used, but I can say that they did not ask for a continuance. As to explaining to them what they were signing when they were signing their pleas of not guilty, the practice here is the Judge reads the indictment to the defendant, and when he gets through reading the indictment, he asks them how they want to plead, and whichever way they want to plead, the Clerk hands them the indictment and they sign it. I can't remember definitely whether Judge Myers who presided in this case read the indictment to them, but if he didn't it would be a case that was unusual. Normally, the defendants come before the bar and the Judge reads the indictment to them and asks them how they want to plead. I don't recall definitely, but if he had not read it to them, I would have remembered it as a

case of an unusual character. All Judges that I have been before read the indictments, unless counsel announce that they do not want it read. But in this case the Judge would read it to them, because they had no counsel. I do not recall how long the trial lasted.
31 We had quite a number of witnesses that were examined and cross examined, but I don't recall how long the trial lasted. They did not at any time ask my assistance in obtaining witnesses. I recall about a witness that was sent out for by Judge Myers and questioned as to his opinion about counterfeit money. One of the defendants made some suggestion during the trial—I don't recall in what form—that they would like to have someone who was familiar with handling money to say whether or not he could have known when he handled that money that it was counterfeit money. Judge Myers then sent for Mr. Boinest here across the street, who has been in the Sheriff's office for a number of years and handles a good deal of cash collected under tax executions and other executions, and he testified. I do not recall whether the defendant who conducted the trial examined that witness. The witness' testimony as to money was that he said yes that he could have seen that it was not genuine money. (Objection by petitioner's counsel.) I don't know whether I could quote the sixth amendment to the constitution of the United States. I know the effect about compulsory process of witnesses. The constitution gives a defendant a right to have compulsory process for witnesses. I do not know of any personal act of mine in my official capacity, during or before the trial in the way of denying any request of the defendants that would be in violation of the sixth amendment. As for denying them a compulsory process of witnesses, they asked for none.

Cross Examination, (Mr. Shimel).

I pronounce my name Shimel. I have been Assistant District Attorney since 1922. I don't recall whether I was acting before the grand jury at the time the indict-

ment was returned. I drew the indictment. The indictment here shows it was returned January 21st, 1935.
32 It also shows that these men were tried on the 23rd day of January, 1935. When this indictment was returned, I did not furnish these accused with copies of the indictment. As to the law which provides that they shall be, may be furnished free copies of the indictment, that is not what the law provides. It provides that the Clerk of the Court, shall upon the request of the defendant furnish a copy of the indictment. I know nothing about whether the defendants requested a copy of the indictment, when they were brought in for trial on the 23rd day of January. I am assuming that I was present when they were brought in. I don't recall; I assume I was here because I participated in the trial of the case. I wouldn't remember that specific incident. I don't know if the Clerk asked them if they had counsel. I wouldn't say whether or not the Judge asked them if they had counsel. The Judge usually asks defendants whether they have counsel. I don't undertake to say what he did in this particular case. I did not suggest to the Court that in view of the provisions of Article 6, that the defendants should have the assistance of counsel for their defense. I made no suggestion to the Judge. I have explicit confidence in the Judge and his taking care of his own business. The Judge now is on his vacation. He left last Sunday or Monday. The Clerk advises me he left either last Sunday or early Monday morning. I have conducted the correspondence between the District Attorney's office in Atlanta and my office in regard to the taking of these depositions. As to notifying the Judge of the date and time, and of the intention of taking his testimony, I did not notify him of any intention of taking his testimony. The Judge did not feel that he was called upon to have any testimony taken from him. I believe this copy of notice of intention to take depositions is in the file. No. I didn't discuss it with the Judge, that is, the intention of taking

testimony of myself, Mr. Sapp and the Judge. I
33 asked the Judge what he thought of him testifying and he said he was not called upon to give any testimony. As to whether or not that is the reason he took his vacation now, I would rather you ask the Judge that question. As to telling these men after they were convicted on the 23rd day of January, 1935, that they had 3 days under the recent law or rules, rules formulated under recent law, in which they could file a motion for a new trial, what law provides for 3 days?

(Petitioners' counsel then stated: The rules promulgated by the United States Supreme Court based on a recent Act of Congress.)

If you have that rule, show me the rule and I will be able to tell you. I know of no rule which was fixed—(Objection.) What rule is that—about that? There is a rule that within 5 days from the date of conviction a petition for appeal must be made and allowed. I know of no law that requires me to tell defendants of their rights under that rule. I did not do it. I did not facilitate or urge the early removal of these convicted men from the City of Charleston to the penitentiary in Atlanta. I did not have anything to do with that. I am generally familiar with and have seen this petition for appeal filed by Mr. Bridwell and a similar one filed by Mr. Johnson. Now, when I discussed this matter of taking the testimony of myself, Judge Myers, District Attorney and the Clerk, I told Judge Myers that there was suggestion made as to his testifying in the matter of these two writs of habeas corpus, which had been filed in Atlanta by these two inmates of the penitentiary, Mr. Johnson and Mr. Bridwell, and he said he was not called upon to testify. I have had some correspondence with the distinguished gentlemen here from Atlanta representing the District Attorney's office but I don't remember in particular communicating to them that Judge Myers

said he did not feel called upon to testify. I can look at the file and tell you. I want to answer that if Counsel is interested in knowing definitely what I told these
34 distinguished gentlemen in my communication with them, I will be glad to look up the record and so advise him.

RICHARD W. HUTSON, (Recalled):

Cross Examination.

With regard to this paper and recognizing it as a petition for appeal filed by Monroe C. Bridwell, and another by John A. Johnson, I have to be very frank and say I don't think I have ever seen this paper. (Looking on back thereof.) It was filed in my office on May 15th, 1935. As to the other having been filed the same time, I notice the indorsement on the back of the record, clipped together, which seems to be the writing of one of the deputy clerks. Looking at the carbon copy of it and at this at the same time and comparing the textures, they are exactly alike. As to those letters being written at the direction of the Judge, my recollection is now somewhat refreshed. I do recall seeing these papers. That letter was written at the direction of the Judge, as I recall it, yes, sir. I have absolutely not at all discussed with the Judge the matter of taking his testimony and my testimony and the others in this case.

Direct Examination.

(Indicating same papers as above): The date of that letter is May 20th, 1935. My recollection now is that I sent that at the direction of Judge Myers. As to the date of the filing of the paper there, the motion for a new trial or appeal, the papers are clipped together and are filed on May 15th, 1935. With regard to the date of that appeal there, the pauper's affidavit sworn to and signed as to costs on May 10, 1935. The trial was January 21st, 1935. I do not recall receiving any appeal or any letter

from these defendants before that date of when it is filed in regard to an appeal. There was no appeal filed to my knowledge until that one was attempted to be filed after it was too late. In giving me directions to write that letter it was the Judge's impression that the
35 appeal was filed too late under the rules.

Re-Cross Examination.

I see one of the deputy clerks wrote that letter. I didn't discuss it with the Judge myself at any length. I do remember discussing the writing of that letter.

(Mr. Sapp states that he desires to take the stand again.—Objection by petitioner's counsel to Mr. Sapp's taking stand again.)

Mr. Sapp:

The statement I shall make is not based on any testimony, or is not as a result of any testimony taken during my presence, in the latter part of the examination here. The charge, or at least the insinuation is that my office has railroaded these defendants and has not given them a fair trial as provided by the constitution and laws of the government. I want to state, therefore, that if I didn't make clear in my direct examination the reason for these defendants having been tried so quickly after the indictment was found, that my purpose in trying them at that time was not to take away any rights they had or to railroad them, so to speak, in the trial of their case. On the contrary, it was with the intention and for the purpose of giving these defendants every right, that I conceive them to have, by giving them a speedy trial, in view of the fact that they were incarcerated in the jail at Charleston, S. C., and had been so incarcerated for a considerable number of weeks. And as is my invariable custom when the grand jury presents a bill against a man in jail without bond, I have the man brought in and ascertain if he is ready for trial in order that if he is

acquitted he may be relieved of the punishment of being confined in a jail, or if he is convicted he may have credit, at the quickest possible time for the commencement of his sentence. It was for that reason that I called these defendants in, or had them called in, and tried them as quickly as possible after an indictment was found by the Grand Jury. An indictment was found by the
36 Grand Jury sitting at that term of the Court. When the indictment was found, I personally ascertained from these men if they were ready to go to trial. They told me they were. They didn't request any counsel, as I stated before, nor did they ask that any witnesses be subpoenaed. If they had, I would have been glad to give them, as would have been my duty to do, such reasonable time, in the judgment of the Court, as would have been necessary for them to properly prepare their case.

Respondent's Counsel:

The government desires to put into the record, since it was brought forth by Counsel for the petitioners, the purported appeal is in each case, including the petition for appeal, the assignment of errors, the pauper's affidavit in lieu of the payment of costs, showing the dates that it was filed, as the matter was presented by the Counsel for the petitioners on the cross examination of the witnesses in these depositions. This is insisted on to show as a matter of law the lateness in which it was presented and not conforming to the rules when you petition for an appeal, which should be presented to the Court.

37 Fifth, the oral testimony of the following witnesses:

MR. W. J. BENNETT, called by the respondent, testified on oath:

I am county jailer at Charleston, South Carolina, and was county jailer at the same place during the months of

January and February, 1935. I had one deputy and a guard in the day and one deputy and guard at night. Those two men are Bridwell and Johnson, whom I know, and saw in the month of February, 1935, in the Charleston county jail. I saw them frequently after their trial over there in the Eastern District of South Carolina in the Federal Court. They were returned to my jail after their trial. Counsel came to see them before the trial but they made no requests to me to see counsel after the trial. The counsel that came to see them before the trial was Mr. Fromberg, who is now with the Department of Justice in Washington. The prisoners were sentenced on the 23rd day of January, but I don't remember the the date they were removed from the jail. They didn't stay there very long after that, probably five or six days or maybe a week.

I make an inspection of the jail myself. I make a point to go by each cage every day. I passed through the jail on January 23, 24, and 25, 1935. The prisoners made no request to me to be represented by counsel or any request to get in touch with counsel.

On cross-examination, Mr. Bennett testified:

There is one assistant jailer and one guard in the daytime and there is one guard and one assistant jailer in the night. The colored prisoners do the general work around the jail. If a prisoner wants to get in touch with me or one of my assistants, he would pound on a bucket or anything he could get to attract our attention. I didn't know that these men pounded anywhere between twenty-five and thirty times and asked that I send a message into Charleston for them during those two days. I would have heard if they had done this. I don't say
38 I didn't hear them knock. They knock all day long. They were not in a cage by themselves. They were in a cage with several other prisoners. The name of the deputy on duty at that time is J. A. Gleason. Gleason is not here.

MONROE C. BRIDWELL, one of the petitioners, testified, on direct examination, in his own behalf:

I was arrested in Charleston on this charge under which I am now being held on November 20th or 21st around midnight; if it was after midnight, it was the 21st and if it was before midnight, it was the 20th. The hearing was held before the United States Commissioner, and I had a lawyer representing me at that hearing whose name was Mr. Joseph M. Fromberg. As a result of the Commissioner's hearing, I was held over for the Grand Jury. After the hearing, we were carried over to the county jail at Charleston. Mr. Fromberg came over and represented us until he released us by letter on the 14th of January. Trial in this case was the 23rd of January. We did not have any lawyer representing us between the 14th of January and the trial of the 23rd.

I first heard I was indicted the morning of the 23rd. On the morning of the 23rd, I was brought to the Court and someone, I presume it was the clerk, asked how we were pleading and we pleaded not guilty. I signed something, whatever the clerk gave me to sign, and the District Attorney was standing like you were standing and I was standing alone to sign the plea, and I asked, "Could I be represented by counsel?" The District Attorney answered me that in South Carolina counsel was only appointed in the case of capital punishment. The Judge was on the stand at the time that remark was made.

The Judge did not ask me if I had counsel at any time. The clerk asked me if I had counsel and I said no, and asked if I could have counsel. I made the request in an ordinary tone of voice, just like I'm talking now. I don't
39 believe the Judge was engaged in any other business at the time I asked for counsel.

In answer to a question by the Trial Judge, witness replied:

I believe the Trial Judge in my case could have heard my request for counsel. I believe he was looking at me,

but he said nothing. He did not ask whether I wanted counsel and said nothing about counsel at all.

Direct examination continued:

Someone asked me whether I was ready to proceed with the case. I would not be positive who asked. When I was asked this question, I said I guessed I was as ready as I could be. I had been in jail a little over two months at this point. I did not know how long it was until the next term of the Court. I had not been out on bond. I was not able to make bond.

The trial took possibly an hour, possibly an hour and a half. About thirty minutes after the recess, the jury came in. I left the Courthouse about 6:00 o'clock the same evening and was taken to the county jail. All during the day that I was in Court, I had no opportunity to talk to any lawyer about representing me.

When I got back to the county jail, I tried to get in touch with a lawyer. I asked the jailer if he would communicate with a lawyer for me and gave him a lawyer's name which was Major Myers. I asked every jailer there during the next twenty-four hours to get in touch with Mr. Myers for me.

The Trial Judge asked whether the witness had attempted to request counsel of W. J. Bennett. The witness answered that he was not positive whether he had asked Bennett, because during his two months there, he only saw him about three times. He did not believe he had an opportunity of asking Bennett.

On continuation of the direct examination of the same witness, he stated:

I asked for counsel every time there was an opportunity during the day and a half after the trial. Finally I asked for a Western Union boy and a Postal Telegraph boy came. I gave the boy a message and one dollar and asked him to deliver it. The boy was gone about two hours and came back and said he could

not locate the lawyer (Major Myers). I left the jail for the Atlanta penitentiary about 6:00 of the morning of the 25th. Johnson and I and two marshals left by automobile. When we arrived at the Atlanta penitentiary, we checked in, changed all our clothes, took a bath and went to Isolation. The next day, we were carried back to the record office and then carried back to Isolation. Isolation is quarantine. We were segregated from other prisoners.

After I got to the Atlanta penitentiary, I made no further effort to get in touch with a lawyer until I got out of segregation. After I got out of segregation, I asked another prisoner who knew a little something about law what procedure I could take. He said I would have to get the papers from Charleston, South Carolina, and Johnson wrote and got the papers, and they first sent only one indictment. Johnson had to write again to get the other indictment. About May, I wrote and asked for the right to appeal. The Judge wrote back that it was then too late.

I first talked with a lawyer about my situation when I was brought here to this Court. That was after my appeal was denied on account of being too late and after I filed a habeas corpus petition in this Court. Then a lawyer was appointed for me here. I didn't ask any of the officers at the Federal penitentiary to put me in touch with a lawyer or give me an opportunity to consult a lawyer.

I wasn't advised by anyone connected with the prosecution or the Court that I was entitled to a lawyer either at the time of the trial or at any time. I did not state that I wanted to proceed without a lawyer. I didn't have the least idea at all about the time within which I had to file a motion for a new trial or file an appeal after I was convicted. Mr. Fromberg did not represent me at the date of the trial. Mr. Fromberg was retained by me and Johnson the day after we were arrested.
41 Johnson paid him $100.00. He represented us at the hearing before the Commissioner and at

the hearing he would not let us testify. He said we should not testify at all at the Commissioner's hearing. After the Commissioner's hearing, he came to see us two or three times. I told him I didn't have any money at all and that I couldn't get any money. I told him that I was trying to borrow some money but didn't think I would be able to get any. He told me he thought my only chance was to plead guilty and I told him I didn't care to plead guilty, and he said I would have to plead guilty anyway, probably. I told him I wasn't guilty and I would not plead guilty. He said there would be no use for him to represent me if I would not plead guilty and if I could not get any money so I told him I would not have him represent me. Johnson and I wrote him at least two times, I believe three times, asking him to release us from our contract, but he would not release us.

On January 14, Mr. Fromberg actually withdrew from his employment. We were unsuccessful in getting any other lawyer to represent us, though we made every effort to do so.

I was convicted of a charge of passing counterfeit money. I did not know that this money was counterfeit.

I only had an education at a country school where there are no grades. I suppose my education stopped at about the fourth or fifth grade. I was about fifteen years old when I quit school. At the time I was arrested, my home was Brooklyn, New York. I had no friends in Charleston at the time of my arrest.

On cross-examination, the witness testified:

On numerous occasions, I hit the pail against the iron in the jail so the jailer would come and talk to me. I tried to get a lawyer prior to the trial when Mr. Fromberg said he could not represent me any longer unless I wanted to plead guilty. Then I tried to get the jailer to get Mr. Myers to come over to the jail. After
42 I was tried, I spent most of my time trying to get the attention of the jailer in order to secure

a lawyer. Before the trial I didn't spend most of my time trying to get a lawyer, maybe I tried once a week, asking for Mr. Myers to come and see me. I was not in a hurry then, maybe I asked once or twice or three or four times. I went over to the Court on the 23rd. I asked in the Court of anyone in the Court within hearing of my voice if I could have a lawyer. The District Attorney answered me. When I was in the Court, the Clerk told me to sign the indictment and the clerk asked: "Have you got a lawyer?" and I said "No." Then I asked could I have a lawyer appointed to represent me. The District Attorney answered that question. I had not directed the question to the Judge in particular. I had just made a request to anybody within hearing. I did not have opportunity of getting in touch with lawyers at the Court on the day of the trial. I didn't know anybody in the Court room."

The District Attorney said the Eastern District of South Carolina only appointed counsel in capital offense.

I had an opportunity in the first three or four days after my arrival at the Atlanta penitentiary to write letters to the outside. I could get pen, ink, paper and envelopes on Sunday. I arrived two days before Sunday. I didn't know anybody to communicate with on the outside. I knew Major Myers in South Carolina, but my conception of counsel would be to have a counsel in Atlanta. I had never been in Court. I did not make an attempt to reach an attorney. I did not make any attempt to reach the Trial Judge by writing after I arrived at the Atlanta penitentiary. I did not attempt to reach the Clerk of the Court or the United States Attorney or the Judge of this (Northern District of Georgia) district, or the warden of the penitentiary. I attempted to reach an official after my arrival in Atlanta. I wrote the Clerk of the Court in South Carolina, I don't know the date, to get the indictment papers. I made no attempt to follow up the letter I wrote to the Clerk of the District Court in South Carolina. I didn't know who to get in touch with.

43 I didn't get up in Court and say I wanted counsel because I had been in the Marine Corps eleven years when I was arrested. The Marine Corps is a very strict military organization where you only speak when you are spoken to. That is one reason I didn't get up in Court and say I wanted counsel. It is a matter of training. When I was told something in Court I thought that was final and that I had no right to go further in the matter.

I was in the Marine Corps at the time of my arrest in South Carolina. My rank was corporal in the Marines. I had eleven years of consecutive service and I had an excellent record at all times.

I tried to speak to the jury after the evidence was in during my trial over in the Eastern District of South Carolina. I told the jury, "I don't consider myself a hoodlum as the District Attorney has made me out several times. I told the jury that I was not a native of New York as the District Attorney stated, but was from Mississippi and only stationed for Government service in New York. I only said fifteen or twenty words. I said I didn't think I was a hoodlum and could not have been one of very long standing because they didn't keep them in the Marine Corps.

I objected to one witness' testimony. I didn't ask him any questions, I only objected to his whole testimony. After the prosecuting attorney was finished with the witness, he said, "Your witness," and I got up and objected to the testimony on the grounds that it was all false, and the Trial Judge said any objection I had I would have to bring proof or disproof.

I asked if I could get witnesses. I made the request on the day of the trial of the District Attorney. I didn't ask the Judge to subpoena any witnesses. I asked the District Attorney in the Court room and he said it was too late. I asked the District Attorney in the presence of the Judge.

A witness was brought in that they said I requested, though I did not request that witness. The question was

whether I could tell or whether any ordinary
44 person could tell whether money was counterfeit, and I said I did not believe an ordinary person not used to handling money any more than I was could tell it was counterfeit, and the District Attorney said, "We'll settle that, if you have no objection, and pick somebody up and put him on the stand and see." I said, "I have no objection." They put a man on the stand, but I did not ask for the witness they put on the stand. I made a suggestion to the District Attorney and he said he would get a witness.

After I got to Atlanta, I wrote to my wife. I did not write to anyone else immediately after I got to Atlanta. During the first two weeks, I'm not sure, but I don't believe I wrote to anyone else. I didn't write to any lawyer within the first two weeks after arriving in the Atlanta penitentiary in order to get out. I wanted to find out a little first.

On re-direct examination, the witness said:

I did not have a chance to speak to the witness who was put on the stand for me by the District Attorney. I did not know who he was. Since the trial, I have learned he was a deputy sheriff or tax collector. I supposed he was accustomed to handling money. I did not know him, by name, when he was brought into the Court room. I did not know who was going to be called. I did not know anything about my rights to subpoena witnesses on my behalf. Mr. Fromberg, while he was still my lawyer, told me that any witnesses I had would have to be paid for by me. Some of the prisoners in the jail told me I would have to get witnesses who would have to be paid for by the Government, but when I asked the District Attorney over at the trial, he said it was too late. The District Attorney told me it was too late after I had said I was ready for trial. This was after the trial had started. Nobody told me that I had a right to have witnesses brought in without expense to me before the trial began.

45 On re-cross examination, the witness testified:

I was in the marines eleven years. I am not familiar with Court martial law. It was not required reading for one to be familiar with Court martial. I attended one Court martial. There was counsel at the Court martial proceeding for the party involved because no one comes to trial in the service without counsel. In the service, you are not allowed to go to trial without counsel. You don't have to ask for him since he is appointed.

On re-direct examination, the witness testified:

Johnson was tried at the same time I was tried. He made no argument to the jury. He did not examine any witnesses.

The Trial Judge asked if the witness maintained the entire innocence of the offense charged. The witness answered in the affirmative.

JOHN A. JOHNSON was called and testified, in his own behalf, as follows:

I did not know that the money I passed was not genuine. I have had fifth grade schooling. At the time I was arrested, I had been living in New York. I was then in the service. I had never had any legal training. I was in jail all the time prior to the trial. I first learned that an indictment had been returned against me on the day we were tried, the 23rd of January. I only learned I had been indicted on the morning they brought me into Court. I had no contacts in Charleston other than those Bridwell had. Everything Bridwell testified to about Mr. Fromberg and Mr. Myers related to me as well.

On the morning of the 23rd about 8:00 or 9:00, two marshals came to the jail and took us to the post-office to the Court room. I assumed that we were to be indicted

before a grand jury. I found out from the talk of the two marshals that we were going to be tried. Then they asked us how we were going to plead and we
46 pleaded not guilty. The Clerk said to Bridwell "You have not counsel?" and he said, "No," and he asked for counsel and the District Attorney answered and said they did not appoint counsel in South Carolina. I told the two marshals there that it looked to me like we could have the trial continued and put off a few days until we could make arrangements. They said we could not do that and one of them said something to the District Attorney and the Judge overheard what he said and the Judge said "It is too late now. We will go on with the trial." The Judge said that and the Judge must certainly have heard Mr. Bridwell's statements because the Judge seemed to be alert. I heard Bridwell's statement about wanting counsel. I heard the District Attorney reply. I stated a moment ago what the District Attorney said.

Nobody told me about my right to have witnesses subpoenaed upon my behalf. I did not know that I had a right to have witnesses subpoenaed without expense to me. I didn't know anything about my right to have a continuance of the trial.

I made an effort continuously after the trial to get a lawyer while we were in Charleston. I saw the man who testified this morning on behalf of the Government (Mr. Bennett). I saw him when he came through his office to go on up to the jail coming back from the trial. I did not see him upstairs in the jail. I asked to see the man in charge of the jail. I saw Mr. Bennett's son at the door of our cell and we told him a number of times that we wanted a lawyer brought. I believe it was his son, I never knew for sure. After we got back from the trial, I got the impression from the other inmates there that you could not write anything out in a letter about your case. I was under the impression during the first week or two after I arrived in the Atlanta penitentiary that I did not have a right to write out about our case. No one in connection with the enforcement of the rules of the peni-

tentiary told me that I couldn't write out, but other fellows who had been there longer than I had
47 said you couldn't write out about your case. That was the impression I got from the other prisoners.

On cross examination, the witness testified:

I wrote letters out of the Atlanta penitentiary during the first two or three weeks. I wrote to a friend. I arrived one week and the following week I wrote a letter. I wrote other letters after that. I did not write to any lawyers or any judges or public officials, until I wrote to the Clerk of the South Carolina District Court in May. No prison officials told me that I couldn't write out. The inmates gave me that impression. I had pen and ink and paper to write but I did not attempt to write. Bridwell was talking for me when he said we have no money to employ counsel. I did not make any such statement.

The first notice I had of any charge against me was on January 23rd. I knew I was being held in jail on a counterfeiting charge, but I did not expect any trial. I thought I would be released when the grand jury met. I knew that there would be some sort of determination of whether I would be charged, but I didn't know that we had already been indicted.

On re-direct examination, the witness stated:

I didn't know what the Court proceedings would be before we were turned loose, but I was told that when the Court met that would be the end of it, and I was thinking that if I was not guilty I would be turned loose. That's all I knew about it. I didn't know an indictment had already been returned against me when I went to Court.

I maintained that I was innocent at the time of the trial and now maintain that I am wholly innocent of the offense charged.

Respondent thereupon called B. F. BATES, who testified:

I am the Record Clerk at the United States Penitentiary in Atlanta and was Record Clerk in January of 1935. All prisoners received by the penitentiary are re-
48 ceived under a uniform procedure. The receiving officer may be one of three receivers. When the prisoner is delivered, the official receives the Court papers and the prisoner is given a number. Then he is assigned to a cell. First, the prisoner is quarantined as to health or dangerous disease. I have a record of all incoming and outgoing letters. I have a record of all the letters which were sent out by the petitioners, Bridwell and Johnson. In the record of Bridwell, the first letter he wrote was to his wife in Brooklyn, New York. This letter passed through the mail office February 1st. Bridwell sent a letter to his wife on the 1st, 5th, and again on the 9th and again on the 16th and again on the 23rd of February. On March 30th, the record shows a letter to Mr. Fromberg, a letter on the 13th of May to Frank R. Myers, Jr., Charleston, South Carolina. The letters sent out in the month of March were to his wife on the 5th, 9th, and 14th, 17th, 23rd and 29th; one to Mr. W. F. Hall at Brooklyn, New York, on the 2nd of March; one to Mr. Fromberg on the 30th. In April he sent out seven letters. In May the record indicates a letter to Judge Myers, the Trial Judge.

Johnson's record indicates that the first letter he sent was to Miss E. Thomas, Cumberland, Maryland, on the 28th of February, and subsequent letters to the same person on the 7th, 14th, 16th, 17th, 25th of February. On the 27th of February, the record indicates he wrote to the Clerk of the Court at Charleston, South Carolina. In the month of March, Johnson wrote Miss E. Thomas on the 4th, 10th, 15th, 17th, 23rd, and 28th, and to the Clerk of Court on the 5th and on the 14th.

On cross examination, the witness stated that his record indicated there were no other letters mailed during the months in question.

On re-direct examination, the witness testified:

All prisoners pass through the Clerk's office as soon after they were received as the Clerk can get to them. Those prisoners were received on the 25th day of
49 January and were examined in his office on the next day. The examination consisted of an identification examination. I don't know at what hour the prisoners were received on the 25th.

On cross examination, the witness testified:

I make up the records to show when the prisoners are entitled to be released on "good time." These prisoners are entitled to be released in July, 1938. Mr. Bridwell was granted parole, effective April 23, 1937.

In rebuttal, attorney for the petitioner recalled MONROE C. BRIDWELL, who testified as follows:

I wrote a letter to Mr. Fromberg after I arrived at the Atlanta penitentiary. I wrote him and asked him to mail me my military discharge which he had in his possession. I had given him this military discharge when I retained him and I wrote and asked him to send it to me and that I would pay all the expenses. He never answered me. Finally, I asked the Social Service officer at the prison to write him and the Social Service officer received a letter that I would get my papers some time. I have never gotten them.

d pleadings and oral testimony and documentary
nce are hereby settled as the evidence in the said

s August 13, 1937.

E. MARVIN UNDERWOOD,
United States Judge.

e foregoing is a true and correct summary of the
nce introduced at this trial.

HARVEY H. TYSINGER,
Asst. United States Attorney,
SUTHERLAND, TUTTLE &
BRENNAN,
By ELBERT P. TUTTLE.

ed Aug. 14, 1937.

EXHIBIT A.

United States of America,
ern District of South Carolina,
ne District Court,
rleston Division.

1st Count, Vio. Secs. 265 and 550, Title 18 USC.

a stated term of the District Court of the United
es for the Eastern District of South Carolina, begun
holden at Charleston, within and for the District
esaid, on the third Monday of January, in the year
ur Lord one thousand nine hundred and thirty five,
Grand Jurors of the United States of America, within
for the District aforesaid, upon their oaths respective-
lo present, that Monroe C. Bridwell and John A.
nson, late of Charleston, in the County of Charleston,
he State of South Carolina, hereinafter called the
ndants, on the twenty first day of November, in the

year of our Lord one thousand nine hundred and thirty four, at Charleston, in the County of Charleston, in the State aforesaid, in the aforesaid Division and District, and within the jurisdiction of this Court, with intent to defraud the United States of America, one Wilma Blair and other persons to the Grand Jurors aforesaid unknown, did unlawfully, knowingly, wilfully and feloniously, pass, utter and publish and cause to be passed, uttered and published, and did aid, abet, counsel, command, induce and procure the uttering and publishing as genuine certain falsely made, forged and counterfeited obligations and securities of the United States; that is to say, the said defendants did, at the aforesaid time and place, pass, utter and publish as genuine and cause the passing, uttering and publishing as genuine, and did aid, abet, counsel, command, induce and procure the passing, uttering and publishing as genuine, and did deliver and cause to be delivered to the said Wilma Blair four (4) counterfeited Twenty Dollar ($20.00) Federal Reserve Bank Notes purported to have been issued and circulated by and under the authority of the United States of America, * * *

2nd Count, Vio. Sec. 265, Title 18 USC.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present, that Monroi C. Bridwell and John A. Johnson, late of Charleston, in the County of Charleston, in the State of South Carolina, hereinafter called the defendants, on the twenty first day of November, in the year of our Lord one thousand nine hundred and thirty four, at Charleston, in the County of Charleston, in the State aforesaid, in the aforesaid Division and District, and within the jurisdiction of this Court, with intent to defraud the United States of America, one Wilma Blair and other persons to the Grand Jurors aforesaid unknown, did unlawfully, knowingly, wilfully and feloniously, have in their possession certain falsely made, forged and counterfeited obligations and securities of

the United States, to-wit, twenty one (21) counterfeited Federal Reserve Bank Notes, purported to have been issued and circulated by and under the authority of the United States of America, * * * contrary to the form of the Statute of the United States in such case made and provided, and against the peace and dignity of the United States.

(Sgd.) CLAUD N. SAPP,
United States Attorney.

EXHIBIT B.

Verdict.

We, the Jury, find the defendants guilty this 23 day of Jan., 1935.

M. T. EVANS, Foreman.

51 EXHIBIT C.

District Court of the United States of America, Eastern District of South Carolina, January Term, 1935.

Present, Hon. Frank K. Myers, District Judge, Presiding.

The United States,
vs.
John A. Johnson.

Indictment for Vio. Secs. 265 and 559, Title 18, USC.

Sentence.

The sentence of the Court is that the defendant John A. Johnson be imprisoned in the U. S. Penitentiary, Atlanta, Ga., for Four (4) years and Six (6) months.

FRANK K. MYERS,
U. S. Judge, Eastern District of South Carolina.

R. W. HUTSON,
Clerk, D. C. U. S., Eastern District of South Carolina.

EXHIBIT D.

To U. S. Marshal for the Eastern District of South Carolina:

You are hereby Commanded to take into custody the Defendant ..... and cause him to undergo the above sentence of the Court.

Witness my hand and seal of the said Court at Charleston, S. C., this 23rd day of January, A. D. 1935.

R. W. HUTSON,
Clerk, D. C. U. S., Eastern District of South Carolina.

I hereby certify and return that I have this date placed the within named John A. Johnson in the United States Penitentiary.

WILLIAM F. BURGSSON,
Marshal,
J. F. MARTSCHINK, Deputy.

ORDER DISCHARGING WRIT AND REMANDING PETITIONER.

52, (Title Omitted.)

The above case came on regularly for trial and was heard and considered.

Petitioner had a former writ of habeas corpus in this Court involving the same questions, but this second writ was allowed due to the peculiar circumstances surrounding the case, and the desire of the Court to afford opportunity to present any additional facts and views which petitioner desired to present.

Upon consideration of the case, however, I find that it does not substantially differ from the one heretofore

decided by this Court (Johnson v. Aderhold, Warden, 13 Fed. Supp. 253), and for the reasons stated in the decision in that case, it is:

Ordered and Adjudged that the writ of habeas corpus be and same hereby is discharged and petitioner remanded to the custody of respondent.

This April 3rd, 1937.

E. MARVIN UNDERWOOD,
United States District Judge.

Filed April 3rd, 1937.

PETITION FOR REMOVAL.

(Title Omitted.)

To the Honorable, the Judges of the United States District Court for the Northern District of Georgia, Atlanta Division:

Now comes the petitioner, John A. Johnson, by Sutherland, Tuttle & Brennan, his attorneys, feeling himself aggrieved by an order made on the 3rd day of April, 1937, discharging the writ of habeas corpus heretofore filed and allowed herein, and remanding him to the custody of the Warden of the United States Penitentiary at Atlanta, Georgia, hereby appeals to the United States Circuit Court of Appeals for the Fifth Circuit, and respectfully shows that in and by said order manifest error was committed for the reasons specified
53 in the assignment of errors which is filed herein, and prays for an order allowing petitioner to prosecute said appeal, and that a transcript of record, papers and proceedings upon which said order was made may be duly authenticated and sent to the United States

Circuit Court of Appeals for the Fifth Circuit, and that a citation be issued as provided by law.

Dated, Atlanta, Georgia, July 2, 1937.

ELBERT P. TUTTLE,
SUTHERLAND, TUTTLE & BRENNAN,
Attorneys for Petitioner.

Filed July 2, 1937.

ORDER GRANTING APPEAL.

It is Ordered that the appeal, as above prayed for, be allowed and that the transcript of record, papers and proceedings herein be duly authenticated and sent to the United States Circuit Court of Appeals for the Fifth Circuit.

Dated July 2nd, 1937.

E. MARVIN UNDERWOOD,
U. S. D. J.

Filed July 2, 1937.

ASSIGNMENTS OF ERROR.

(Title Omitted.)

Now comes the petitioner-appellant above named and files the following assignment of errors upon which he will rely upon his prosecution of an appeal from the order of this Court made herein on the 3rd day of April, 1937.

First: The United States District Court for the Northern District of Georgia erred in discharging the writ of habeas corpus theretofore allowed herein.

54 Second: The District Court erred in refusing to hold that the trial and conviction of your petitioner were null and void under the due process clause of the Fifth Amendment to the Constitution of the United States.

Third: The District Court erred in refusing to hold that the trial and conviction of your petitioner were null and void because your petitioner was deprived of the assistance of counsel for his defense and of the right to have compulsory process for obtaining witnesses in his favor as guaranteed him by the Sixth Amendment to the Constitution of the United States.

Fourth: The District Court erred in refusing to hold that the circumstances subsequent to the trial and conviction of your petitioner amounted to a deprivation of the right to make a motion for a new trial and to take an appeal from such judgment of conviction.

Fifth: The District Court erred in refusing to hold that the deprivation to your petitioner of the right to have counsel for his defense in violation of the Sixth Amendment and of the due process clause of the Fifth Amendment to the Constitution of the United States did not deprive your petitioner of the right to present a motion for a new trial and to take an appeal.

Sixth: The District Court erred in holding that your petitioner, subsequent to his trial and conviction and within the time permitted to move for a new trial and to appeal, had an opportunity to move for a new trial or to take an appeal.

Seventh: The District Court erred in holding that, although your petitioner had by his trial and conviction been deprived of his liberty without due process of law in violation of the Fifth Amendment to the Constitution of the United States, the District Court did not have jurisdiction or power to discharge your petitioner upon a writ of habeas corpus.

Eighth: The District Court erred in holding that, although your petitioner had by his trial and conviction, been deprived of his liberty without due process of law in violation of the Fifth Amendment to the Constitution of the United States, there was no ground for discharge of your petitioner upon a writ of habeas corpus.

55 Ninth: The District Court erred in holding that, although your petitioner had, by his trial and conviction, been deprived of the assistance of counsel for his defense and of the right to have compulsory process for obtaining witnesses in his favor as guaranteed by the Sixth Amendment to the Constitution of the United States, the District Court did not have power or jurisdiction to discharge your petitioner upon a writ of habeas corpus.

Tenth: The District Court erred in holding that, although your petitioner had, by his trial and conviction, been deprived of the assistance of counsel for his defense and of the right to have compulsory process for obtaining witnesses in his favor as guaranteed him by the Sixth Amendment to the Constitution of the United States, there was no ground for discharge of your petitioner upon a writ of habeas corpus.

Eleventh: The District Court erred in not holding that the answer of the United States to the writ of habeas corpus was insufficient in law.

Wherefore, your petitioner prays that said order be reversed and that such other and further orders, directions and decrees be made as shall be in accordance with law.

ELBERT P. TUTTLE,
SUTHERLAND, TUTTLE & BRENNAN,
Attorneys for Petitioner.

Filed July 2, 1937.

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56 BOND.

Know all Men by these Presents, that we, John A. Johnson, as principal, and The Aetna Casualty and Surety Company, as sureties, are held and firmly bound unto Fred G. Zerbst, Warden, in the full and just sum of Two Hundred Fifty Dollars to be paid to the said Fred G. Zerbst and his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 2nd day of July, in the year of our Lord one thousand nine hundred and thirty-seven.

Whereas, lately at a hearing in a suit depending in said Court, between John A. Johnson and Fred G. Zerbst, Warden, an order and judgment was rendered against the said John A. Johnson and the said John A. Johnson having obtained an appeal and filed a copy thereof in the Clerk's office of the said Court to reverse the order and judgment in the aforesaid suit, and a citation directed to the said Fred G. Zerbst citing and admonishing him to be and appear before the United States Court of Appeals for the Fifth Circuit, to be holden at New Orleans, Louisiana, within 30 days from the date thereof.

Now, the Condition of the above Obligation is such, that if the said John A. Johnson shall prosecute said appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN A. JOHNSON, (Seal)
By ELBERT P. TUTTLE, (Seal)
Atty. at Law.
THE AETNA CASUALTY AND
(Corp. Seal) SURETY COMPANY,
By FAIR DODD,
Resident Vice President.

Attest:
DONALD D. BOLTON,
Resident Assistant Secretary.

Sealed and delivered in presence of—
.....
.....

Approved by—
E. MARVIN UNDERWOOD,
U. S. Judge.

Filed July 2, 1937.

---

57 PRAECIPE.

(Title Omitted.)

To the Honorable Clerk of the above Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Fifth Circuit, pursuant to an appeal allowed in the above entitled cause, and to include in

such transcript the following, and no other, papers and exhibits, to-wit:

(1) The Petition.

(2) The Response.

(3) The Statement of Evidence.

(4) Petition for appeal and order.

(5) Assignments of error.

(6) This praecipe and service thereon.

The said transcript to be prepared as required by law and to be filed in the office of the Clerk of the Circuit Court of Appeals at New Orleans, on or before the 31st day of July, 1937.

ELBERT P. TUTTLE,
SUTHERLAND, TUTTLE & BRENNAN,
Attorneys for Appellant.

Service of the above praecipe accepted this 2nd day of July, 1937.

A. SIDNEY CAMP,
Assistant United States Attorney.

Filed July 2, 1937.

58 CLERK'S CERTIFICATE.

United States of America,
Northern District of Georgia. ss.

I, J. D. STEWARD, Clerk of the District Court of the United States in and for the Northern District of Georgia, do hereby certify that the foregoing and attached 57 pages contains a true, full, complete and correct copy of the original record, assignments of error and all proceedings had in the matter of John A. Johnson, Petitioner, Appellant, versus Fred G. Zerbst, Warden, United States Penitentiary, Atlanta, Georgia, Respondent, Appellee, as specified in the praecipe of counsel herein and as the same remains of record and on file in the clerk's office of the said District Court, at Atlanta, Georgia, except that the original citation with acknowledgment of service thereon is included herein in the stead of a copy thereof.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the said District Court, at Atlanta, Georgia, this the 14th day of Aug., A. D. 1937.

J. D. STEWARD,
(Seal) Clerk, United States District Court, Northern District of Georgia,
By C. A. McGREW, Deputy Clerk.

Original citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the United States Circuit Court of Appeals.

* * * * * * * *

[fol. 65] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of October 6th, 1937

No. 8562

JOHN A. JOHNSON

versus

FRED G. ZERBST, Warden, United States Penitentiary, Atlanta, Georgia

On this day this cause was called, and, after argument by Elbert P. Tuttle, Esq., for appellant, and Bates Booth, Esq., Special Assistant to the Attorney General, for appellee, was submitted to the Court.

[fol. 66] OPINION OF THE COURT—Filed November 24, 1937

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 8562

JOHN A. JOHNSON, Appellant,

versus

FRED G. ZERBST, Warden, United States Penitentiary, Atlanta, Georgia, Appellee

No. 8563

MONROE C. BRIDWELL, Appellant,

versus

FRED G. ZERBST, Warden, United States Penitentiary, Atlanta, Georgia, Appellee

Appeals from the District Court of the United States for the Northern District of Georgia

(November 24, 1937)

Before Foster, Sibley and Holmes, Circuit Judges

FOSTER, Circuit Judge:

These cases present appeals from judgments dismissing petitions for writs of habeas corpus to release appellants

[fol. 67] from the Atlanta penitentiary. The evidence is identical in both cases. By agreement only one record was printed, upon which both cases were submitted. The record discloses the following facts.

Appellants were arrested in Charleston, South Carolina, on November 21, 1934, charged with feloniously uttering and passing four counterfeit $20.00 Federal Reserve notes and with knowingly and feloniously possessing 21 counterfeit Federal Reserve Bank notes, with intent to defraud. A hearing was had before a United States commissioner, at which they were represented by counsel of their own choosing. They were bound over to await the action of the United States grand jury and, being unable to give bail, were confined in a local jail. An indictment was returned against them at the next term of court and on January 23, 1935, they were brought into court, pleaded not guilty and were tried to a jury, with the result that a verdict of guilty was rendered. They were sentenced to be imprisoned in the Atlanta penitentiary for four years and six months. No appeal was taken from this judgment. In December, 1935, they filed petitions in the United States District Court for the Northern District of Georgia, seeking release on habeas corpus. The petitions alleged that the judgment of conviction was an absolute nullity, on the grounds that they were innocent of the charge and were denied compulsory process for obtaining witnesses in their favor and to have the assistance of counsel for their defense, in violation of the 6th Amendment; and were therefore denied due process of law, in violation of the 5th Amendment. The District Court appointed competent counsel to represent them on the trial of the habeas corpus cases and evidence was taken on the hearing. The District Court reached the conclusion that they had been deprived of constitutional rights as alleged but that, as the trial court had jurisdiction and the judge was [fol. 68] not prejudiced nor swayed by any improper influence, the judgment was not void and the errors and irregularities complained of could be corrected only on appeal. Bridwell vs. Aderhold, 13 F. Supp. 253. No appeal was taken from these judgments. However, in December, 1936, the applications for release on habeas corpus were renewed on the same grounds. The District Court again appointed competent counsel to represent appellants on the second trial before him and they were represented by competent counsel on this appeal.

There is some conflict in the evidence appearing in the record but the following facts may be considered as proved with reasonable certainty. When appellants were brought into the District Court in South Carolina the indictment was read to them and they signed pleas of not guilty. They were asked by the judge if they were represented by counsel and replied "no", and were then asked by him if they were ready for trial and replied "yes". They did not request the judge to appoint counsel for them, he did not do so of his own motion and they were not represented by counsel at the trial.

Appellants are white men and were both in the service of the United States in the Marine Corps. Bridwell had had eleven years continuous service and was a corporal. The term of service of Johnson is not shown. Bridwell had attended a country school until he was 15 years of age. Johnson had had fifth grade education. During the trial Bridwell assumed charge of the defense for both appellants, cross examined government witnesses, took the stand in his own defense, and at the close of the case addressed the jury. Johnson did not testify. There was evidence tending to show that Bridwell conducted the defense very well for a layman and showed some familiarity with legal procedure. During the trial Bridwell stated that he did not think that [fol. 69] men of such limited knowledge as appellants would know counterfeit money when they saw it and asked that a witness be called to establish whether the money was counterfeit. The District Attorney procured a witness, who was a deputy sheriff in charge of tax collections and handled considerable money in performing his duties. He testified that the money was counterfeit and that that fact was readily discernible. Bridwell had objected to the testimony of other witnesses but no objection was made to the introduction of this witness nor to his testimony.

Bridwell testified the attorney who represented them before the commissioner continued to represent them until some time in January and was paid $100 for his services; that he released them because they would not follow his advice to plead guilty and they had no more money to pay him; that before the trial they made efforts to secure another lawyer, naming him, but were unable to get in touch with him because they were in jail. Bridwell also testified, and this was corroborated by Johnson, that, in the presence

of the judge, he asked the United States Attorney if he could be represented by counsel and was told by him that in South Carolina counsel was not appointed by the court except in capital cases. He then asked if he could have witnesses subpoenaed and he was told by the United States Attorney that it was too late. The United States Attorney, his assistant and the clerk of the court, who were present at the time, denied that Bridwell made inquiry as to securing either counsel or witnesses and denied that the United States Attorney made the statements attributed to him. Appellants further testified they did not know and were not advised of their right to ask for a new trial or take an appeal until after they had been removed to the penitentiary when they were told by a fellow prisoner. With his assistance they prepared an application for appeal but the trial judge declined [fol. 70] to allow it on the ground that it came too late and he was without jurisdiction. There is no doubt that the time for an appeal had elapsed under the criminal appeals rules.

Appellants rely upon the cases of Downer vs. Dunaway, 53 F. (2d) 586, and Powell vs. Alabama, 287 U. S. 45. In Downer vs. Dunaway we reversed a judgment of the District Court dismissing an application for habeas corpus without a hearing. The defendant was a Negro charged with raping a white woman. The trial was conducted immediately after the crime was alleged to have been committed and under pressure of such great public feeling against the prisoner that the militia had to be called out to protect him during the trial. While the defendant was represented by counsel until the verdict was rendered, counsel did nothing to perfect an appeal to the Supreme Court of Georgia. The fact that the accused was not represented by counsel at a crucial time was not entirely the basis of our decision. We concluded that, assuming the allegations of the petition to be true, the trial was dominated by the mob so as to deprive defendant of due process of law.

Powell vs. Alabama went up on writ of certiorari to the Supreme Court of Alabama and was not decided on application for habeas corpus. In that case the defendants were also Negroes charged with raping white women. The danger of lynching was imminent and it was necessary to call out the militia to protect the prisoners during the trial, which was held immediately after they were arrested. The defendants were not represented by counsel. It was held

that in the circumstances attending the trial, considering the youth, ignorance and illiteracy of the defendants, it was the duty of the court to appoint counsel to aid them in the preparation of their defense and in the trial of the case, whether requested or not. We do not consider these cases [fol. 71] controlling as applied to the facts in the cases at bar.

It has been repeatedly held that the writ of habeas corpus may not be substituted for a writ of error or an appeal. If the trial court had jurisdiction, it is only in extraordinary cases, where the circumstances surrounding the trial make it a sham and a pretense, that the writ will lie on the ground that the judgment is a nullity for want of due process of law, even though it be alleged the accused has been denied rights guaranteed by the Constitution. Riddle vs. Dyche, 262 U. S. 333; Goto vs. Lane, 265 U. S. 393. The cases at bar do not present extraordinary features. Appellants were not immature and had sufficient education to understand the charge against them. There was no undue haste in bringing them to trial, there was no popular feeling against them and the trial was quiet and orderly. They had over two months in which to procure counsel or to seek advice from their friends. The presiding judge was not prejudieed against them. There is no showing that there were any witnesses they desired to have summoned to give testimony in their favor. They had the right of appeal and the reasons for their not doing so are immaterial. They did not request the trial judge to appoint counsel for them. Perhaps it would have been better if he had done so of his own motion, but we are not advised of any decision of a court of last resort, state or federal, holding that in a non capital case he was bound to do so. In fact, a number of decisions to the contrary, which we need not review, are cited by counsel for the United States. In Powell vs. Alabama the decision was that counsel should have been appointed in that case but the court expressly refrained from deciding whether that rule should obtain in all cases.

Due process of law does not absolutely require that the defendant in every criminal case be represented by coun- [fol. 72] sel. He may expressly or impliedly waive his right and suffer no wrong. When a defendant is without counsel the judge usually protects his rights. It is not suggested that in these cases the evidence was insufficient to support the conviction.

The judgments dismissing the petitions were right. They are Affirmed.

[fol. 73] JUDGMENT

Extract from the Minutes of November 24, 1937

No. 8562

JOHN A. JOHNSON

versus

FRED G. ZERBST, Warden, United States Penitentiary, Atlanta, Georgia

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court dismissing the petition in this cause be, and the same is hereby, affirmed.

[fol. 74] MOTION AND ORDER STAYING MANDATE—Filed December 14, 1937

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 8562

JOHN A. JOHNSON, Appellant,

vs.

FRED G. ZERBST, Warden, United States Penitentiary, Atlanta, Georgia, Appellee,

and

No. 8563

MONROE C. BRIDWELL, Appellant,

vs.

FRED G. ZERBST, Warden, United States Penitentiary, Atlanta, Georgia, Appellee

Now Come John A. Johnson and Monroe C. Bridwell, the appellants in the above entitled causes, which were

heard together and in which a single opinion was written, and show to this Court that they intend to apply to the Supreme Court of the United States for a writ of certiorari to review the judgments rendered by this Court, and that they intend to make said application within thirty (30) days after the time when the mandate of this Court would normally issue under Rule XXXII.

[fol. 75] Wherefore, appellants pray that the mandate of this Court be stayed and withheld until January 14, 1938, or in the event that a petition for certiorari is filed and dismissed in the Supreme Court prior to the expiration of said time, then until final disposition of the said causes in the Supreme Court.

This 13th day of December, 1937.

(Signed) Elbert P. Tuttle, Sutherland, Tuttle & Brennan, Attorneys for Appellants.

[fol. 76] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT

No. 8562

JOHN A. JOHNSON, Appellant,

versus

FRED G. ZERBST, Warden, United States Penitentiary, Atlanta, Georgia, Appellee

On Consideration of the Application of the appellant in the above numbered and entitled cause for a stay of the mandate of this court therein to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It is Ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition, and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered

that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 14th day of December, 1937.

(Signed) Rufus E. Foster, United States Circuit Judge.

[fol. 77] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA:

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 65 to 76 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 8562, wherein John A. Johnson is appellant, and Fred G. Zerbst, Warden, United States Penitentiary, Atlanta, Georgia, is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 64 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 14th day of December, A. D. 1937.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

[fol. 78] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 14, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 13 1938
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1937.

No. 699

JOHN A. JOHNSON, Petitioner,

versus

FRED G. ZERBST, Warden, United States Penitentiary, Atlanta, Georgia, Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Fifth Circuit.

ELBERT P. TUTTLE,
Counsel for Petitioner.

Of Counsel:
SUTHERLAND, TUTTLE & BRENNAN.

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Supreme Court of the United States.

OCTOBER TERM, 1937.

No.....

JOHN A. JOHNSON, Petitioner,

versus

FRED G. ZERBST, Warden, United States Penitentiary, Atlanta, Georgia, Respondent.

PETITION.

John A. Johnson, by his counsel, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in the above case on November 24, 1937 (R. 66), affirming the judgment of the United States District Court for the Northern District of Georgia.

SUMMARY STATEMENT OF MATTER INVOLVED.

The petitioner filed his petition for the writ of habeas corpus, complaining of his detention in the Federal Penitentiary in Atlanta, Georgia, alleging that he was being held in violation of his constitutional rights. He was arrested in Charleston, South Carolina, on November 21, 1934, together with one Monroe C. Bridwell, charged with feloniously uttering and passing four (4) counterfeit twenty-dollar Federal Reserve notes, and with knowingly and feloniously possessing twenty-one (21) counterfeit Federal Reserve notes, with intent to defraud. At the time of their arrest, petitioner and Bridwell were in the United States Marine Corps, on leave. A hearing was had before the United States Commissioner, at which the men were represented by counsel of their own choosing. They were bound over to await the action of the United States grand jury and, being unable to give bail, were confined in a local jail. An indictment was rendered against them at the next term of court on January 21, 1935. They knew nothing of this indictment until they were brought into court on January 23rd, at which time they pleaded not guilty, and were placed on trial (R. 41, 48).

The men were unable to provide counsel for themselves; the court did not appoint counsel for them; therefore, they were not represented by counsel at the trial. The petitioner, who was thus put in jeopardy of his liberty, had no schooling beyond the fifth grade, and was without any legal knowledge or skill. He was utterly without funds and knew no one in the vicinity of Charleston, where the trial took place. He neither examined witnesses nor testified on his own behalf, nor addressed the jury, although his co-defendant, Bridwell, attempted in a feeble way to

speak in defense of himself and of the petitioner (R. 46, 48).

During the trial, Bridwell stated that he did not think that men *of such limited knowledge as he and petitioner were* would know counterfeit money when they saw it, and asked that a witness be called to establish whether the money was counterfeit. The District Attorney procured a witness, *who* was a deputy sheriff in charge of tax collections, and *handled considerable money in performing his duties* (R. 69). He testified that the money was counterfeit and that that fact was readily discernible.

In addition to the undisputed facts as hereinabove set out, both petitioner and Bridwell testified that they asked the District Attorney in open court whether they could have counsel appointed for them and he replied that counsel was not appointed in South Carolina except in capital cases. The men also testified that they asked the District Attorney in open court after the trial was under way if they could have witnesses, and that he replied it was then too late. The District Attorney and his assistant both disputed the evidence as to the request for counsel and the request for witnesses. Neither court below made any findings as to these disputed facts.

A verdict of guilty against petitioner and Bridwell was rendered on the same day, and the men were both sentenced to be imprisoned for four (4) years and six (6) months. The second morning after the trial, they were transported by automobile from Charleston to Atlanta, a day's trip, and upon arrival there they were placed in quarantine at the Federal Prison. No appeal was taken from this judgment, petitioner having testified upon the habeas corpus proceeding that he knew nothing as to his rights to have counsel at the trial and that he knew noth-

ing as to his rights relating to the filing of a motion for a new trial or prosecuting an appeal.

The petitioner alleged that the judgment of conviction was an absolute nullity on the grounds that he was innocent of the charge, that he was denied compulsory process for obtaining witnesses in his favor, and the right to have the assistance of counsel for his defense, in violation of the Sixth Amendment to the Federal Constitution, and was therefore denied due process of law in violation of the Fifth Amendment to the Federal Constitution. The District Court appointed counsel to represent petitioner on the trial of the habeas corpus case and evidence was taken on the hearing. The District Court reached the conclusion that petitioner and Bridwell, who filed a petition at the same time, had been deprived of constitutional rights as alleged but that, as the trial court had jurisdiction, the judgment was not void, and the errors and irregularities could be corrected only on appeal. *Bridwell v. Aderhold*, 13 F. Supp. 253. No appeal was taken from this judgment. However, in December, 1936, the application for release on habeas corpus was renewed on the same grounds. Petitioner appeared by counsel and additional evidence was taken and the District Court again discharged the writ and referred to its opinion in the prior case (R. 56). It is from this decision of the District Court that the present appeal was taken. The decision of the District Court was affirmed by the Circuit Court of Appeals for the Fifth Circuit in its opinion of November 24, 1937. Bridwell has since been released on parole, and his appeal is not being prosecuted.

The Circuit Court of Appeals in its opinion stated,

> "They did not request the trial judge to appoint counsel for them. Perhaps it would have been better

if he had done so of his own motion, but we are not advised of any decision of a court of last resort, state or federal, holding that in a noncapital case he was bound to do so. In fact, a number of decisions to the contrary, which we need not review, are cited by counsel for the United States. In *Powell v. Alabama* the decision was that counsel should have been appointed in that case but the court expressly refrained from deciding whether that rule should obtain in all cases" (R. 41).

The Circuit Court of Appeals further stated,

"Due process of law does not absolutely require that the defendant in every criminal case be represented by counsel. He may expressly or impliedly waive his right and suffer no wrong. When a defendant is without counsel the judge usually protects his rights * * *" (R. 41).

REASONS FOR GRANTING THE WRIT.

1. The decision of the Circuit Court of Appeals in the case at bar involves an important question of Federal law which has not been, but should be, settled by this Court. The Circuit Court of Appeals held that in a trial for the commission of a non-capital felony, the penalty for which on each of two counts was imprisonment not exceeding fifteen years, due process of law did not absolutely require that the accused be represented by counsel. Such a holding, while not in direct conflict with any applicable decision of this Court, is without precedent in this Court to support it, and is in conflict with the provisions of the Fifth and Sixth Amendments to the Federal Constitution.

2. Such decisions of this Court as discuss the right to counsel as an essential element of due process indicate that the decision of the Circuit Court of Appeals is probably in conflict with applicable decisions of this Court, particularly the cases of *Powell v. Alabama*, 287 U. S. 45, and *Brown v. Mississippi*, 297 U. S. 278.

3. The decision of the Circuit Court of Appeals that where the Court has jurisdiction it is only in extraordinary cases of denial of due process when the circumstances surrounding the trial make it a sham and a pretense that the writ will lie, and that the circumstances of the trial of Johnson and Bridwell did not come within this description is probably in conflict with *Brown v. Mississippi* (supra), where the denial of counsel was said, by way of illustration, to turn a trial into a "mere pretense," and in conflict with *Mooney v. Holohan*, 294 U. S. 103, where the right to habeas corpus was recognized where another type of "mere pretense" was substituted for a trial.

Whether the decision of the Circuit Court of Appeals is based upon the theory that there was no denial of due process as guaranteed by the Constitution, or whether the decision is based upon the proposition that such denial of due process was of such slight degree as not to warrant interference with the void sentence through the process of habeas corpus (the only way open to petitioner when left without guidance of counsel to perfect an appeal within the five-day limit), it is submitted that the decision is in conflict with the principles of justice as announced by this Court in the cases cited, in that it deprives petitioner of the right to counsel as guaranteed by the Sixth Amend-

ment, and of due process of law as guaranteed by the Fifth Amendment of the Constitution.

Wherefore, it is respectfully prayed that the petition be granted.

ELBERT P. TUTTLE,
Counsel for Petitioner.

Of Counsel:
SUTHERLAND, TUTTLE & BRENNAN.

BRIEF IN SUPPORT OF PETITION.

OPINIONS BELOW.

There was no reported opinion of the District Court, but that Court referred to its earlier opinion in a similar case reported at 13 F. Supp. 253. The opinion of the Circuit Court of Appeals is reported at 92 F. (2d) ..., and will be found at page 66 of the record.

JURISDICTION.

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on November 24, 1937. Jurisdiction to issue the writ requested is found in the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE.

A statement of the case will be found in the petition.

SPECIFICATIONS OF ERROR.

Petitioner contends that the Circuit Court of Appeals erred:

1. In holding that in the trial of petitioner for a non-capital felony the trial court was not required to appoint counsel to represent him.

2. In holding that where the accused was tried for a non-capital felony without the assistance of counsel when he was of limited education and without legal skill or

knowledge and without knowledge of his legal rights, and such trial resulted in his conviction, sentence and commitment to the United States Penitentiary for four and one-half (4½) years, petitioner was not entitled to be released upon his petition for writ of habeas corpus.

3. In holding that the judgment of the trial court discharging the writ sought by petitioner was right.

4. In not reversing the judgment of the trial court and releasing petitioner on his writ of habeas corpus.

ARGUMENT.

I.

THE TRIAL AND CONVICTION OF THE PETITIONER DEPRIVED HIM OF DUE PROCESS OF LAW AND OF THE ASSISTANCE OF COUNSEL IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The Fifth Amendment provides that "no person shall be deprived of life, liberty or property, without due process of law." The Sixth Amendment declares that "in all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defense."

Whatever might have been thought the law prior to *Powell v. Alabama*, 287 U. S. 45, it was by that decision established that in a proper case "the aid of counsel is essential to due process" (287 U. S., at p. 68). The issue, of whether the petitioner in the instant case was deprived of his constitutional rights, is therefore presented under both the Fifth and Sixth Amendments. And upon the facts

of the instant case it must be held, it is submitted, that he was deprived of those rights.

The defendant was without funds to employ counsel; he was a person of little education; he was from a distant state; he had no friends in Charleston; he tried, without success, to obtain counsel without compensation. He was brought to trial immediately upon being informed of his indictment. He was charged on an indictment of two counts, where a maximum penalty of fifteen years in the penitentiary and a fine of $5,000 on each count might have been imposed. Under all these circumstances it must be held, as in *Powell v. Alabama, supra,* that "it is the duty of the Court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law" (287 U. S., at p. 71), a duty which the Supreme Court indicated unmistakably was imposed upon the courts of the United States as well as state courts (see 287 U. S., at p. 73). The failure of the trial court to appoint counsel was, petitioner contends, "a denial of due process."

That the Circuit Court of Appeals did not fully appreciate the significance of the *Powell* case is clear from the last paragraph of the opinion of that court, wherein the following language appears:

> "When a defendant is without counsel, the judge usually protects his rights."

Elsewhere in its opinion, the Circuit Court of Appeals recited an incident which itself illustrates the fallacy of the theory that an impartial judge usually protects the rights of an unrepresented defendant. The court stated (R. 68):

> "During the trial Bridwell stated that he did not think that *men of such limited knowledge as appel-*

> *lants would know counterfeit money* when they saw it and asked that a witness be called to establish whether the money was counterfeit. The District Attorney procured a witness, *who was a deputy sheriff in charge of tax collections and handled considerable money in performing his duties.* He testified that the money was counterfeit and that that fact was readily discernible." (Italics supplied.)

The incident points to the very reason why the Supreme Court in *Powell v. Alabama, supra,* rejected the argument that the constitutional requirements of due process were satisfied by the presence of an impartial judge. As was said in that case (287 U. S., at p. 61):

> "* * * But how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that in the proceedings before the Court the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional."

Then, again, the Circuit Court of Appeals misconceived the holding of this Court in the case of *Brown v. Mississippi,* 297 U. S. 278, when it stated:

> "He may expressly or impliedly waive his right and suffer no wrong" (R. ~~72~~ 87).

In the *Brown* case, the accused had been convicted upon the confessions obtained by third-degree methods and his constitutional right against self-incrimination was thus denied. The accused was represented by counsel and it was contended that failure by counsel to move for the exclu-

sion of the confessions operated as a waiver of the constitutional right against self-incrimination. The Supreme Court held that the denial of this right was not a mere error which could be thus waived by the attorneys for the accused, but was an error which rendered the trial a nullity. Mr. Chief Justice Hughes said, at page 286:

> "That complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceedings a mere pretense of a trial and rendered the conviction and sentence wholly void. *Moore v. Dempsey, supra.*"

Moreover, it is not pretended here that Johnson waived his rights, either expressly or impliedly. It is not denied that he was totally ignorant of his right to counsel. Without such knowledge there could be no waiver.

II.

THE COURT BELOW HAD JURISDICTION TO DISCHARGE THE PETITIONER ON WRIT OF HABEAS CORPUS.

The statute regulating the issuance of writs of habeas corpus, so far as here material, provides:

> "*Power of Courts.* The Supreme Court and the district courts shall have power to issue writs of habeas corpus" (28 U. S. C. A., Sec. 451).
>
> "*When prisoner is in jail.* The writ of habeas corpus shall in no case extend to a prisoner in jail unless where he * * * is in custody in violation of the Constitution or of a law or treaty of the United States * * *" (28 U. S. C. A., Sec. 453).

The district court in its opinion upon the first hearing pointed out that "the technicalities involved in the trial and subsequent proceedings for a new trial or appeal were such as to require the appointment of counsel as an essential element of the trial." 13 F. Supp. 253, 255. In spite of the recognition of this principle, enunciated by the Circuit Court of Appeals for the Fifth Circuit in *Downer v. Dunaway,* 53 F. (2d) 586, 589, the decision of the trial court has the effect of saying that the Constitution protects a defendant against his ignorance of his right to have counsel assigned at his trial, but upon his conviction regards him not only as a sadder but a wiser man—wise enough indeed to know not only that he has already been deprived of his constitutional right to counsel, but also that he now has the right to have counsel appointed who will, by motion for new trial or appeal, secure for him a new trial at which he will have counsel. Plainly the decision of the court below completely destroys the substance of the right to counsel.

The question presented is whether a judgment of conviction entered in a trial conducted in violation of the requirements of due process of law is such that it "is void and may be questioned collaterally." It is respectfully submitted that the precise question has been answered in the affirmative by the Supreme Court.

In *Moore v. Dempsey,* 261 U. S. 86, the prisoners had been sentenced after a trial dominated by a mob. The trial court had jurisdiction of the offense and the accused, but the Supreme Court held that the mob domination of the trial deprived the prisoners of their liberty without due process of law and reversed the order of the lower court dismissing a petition for habeas corpus.

Moore v. Dempsey was followed by the Circuit Court of

Appeals for the Fifth Circuit in *Downer v. Dunaway,* 53 F. (2d) 586, in which it was argued that, although the trial had been dominated by a mob, the remedy of the petitioners was by a motion for a new trial or appeal from the conviction, and not by habeas corpus. The Circuit Court of Appeals overruled this argument upon the ground that the failure of counsel appointed by the Court for the prisoners to move for a new trial because of fear of mob violence *was a failure of the corrective process of the Court.*

The analogy between deprivation of liberty without due process of law through mob domination, and similar deprivation through the denial of the right to counsel, was recognized by the Supreme Court in *Powell v. Alabama, supra,* in which it was said that:

> "* * * a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice, but to go forward with the haste of the mob" (287 U. S., at p. 59).

The Circuit Court of Appeals in its opinion predicates the right to protest against the denial of due process on the existence of circumstances surrounding the trial which make it "a sham and a pretense," and the Court appears to consider that such circumstances exist only when there is a spirit of mob domination. In placing such narrow construction upon the rights of petitioner, it is submitted that the Circuit Court of Appeals has ignored the principle announced by this Court in the cases of *Mooney v. Holohan,* 294 U. S. 103, and *Brown v. Mississippi,* 297 U. S. 278. In neither of those cases were there present any of the circumstances of mob domination, but the Court

nevertheless held that, upon the showing of the facts there asserted, the trial in each instance was a "mere pretense." In fact, the Court there grouped the several different types of circumstances together and classified them all as a deprivation of constitutional right which made the trial a nullity. As was said by the Court:

> "* * * The state may not permit an accused to be hurried to conviction under mob domination—where the whole proceeding is but a mask—without supplying corrective process. *Moore v. Dempsey*, 261 U. S. 86, 91. The state may not deny to the accused the aid of counsel. *Powell v. Alabama*, 287 U. S. 45. Nor may a state, through the action of its officers, contrive a conviction through the pretense of a trial which, in truth, is 'but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.' *Mooney v. Holohan*, 294 U. S. 103, 112. And *the trial equally is a mere pretense* where the state authorities have contrived a conviction resting solely upon confessions obtained by violence" (297 U. S., at p. 286). (Italics supplied.)

CONCLUSION.

The question involved in this case is an important question of Federal law in which the opinion of the Circuit Court of Appeals is probably in conflict with decisions of this Court and which should be decided by this Court. It is, therefore, respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

ELBERT P. TUTTLE,
Counsel for Petitioner.

Of Counsel:
SUTHERLAND, TUTTLE & BRENNAN.

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Supreme Court of the United States.

OCTOBER TERM, 1937.

No. 699.

JOHN A. JOHNSON, Petitioner,

versus

FRED G. ZERBST, Warden, United States Penitentiary, Atlanta, Georgia.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR PETITIONER.

ELBERT P. TUTTLE,
Counsel for Petitioner.

Of Counsel:
SUTHERLAND, TUTTLE & BRENNAN,
Atlanta, Georgia.

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

There was no reported opinion of the District Court, but that Court referred to its earlier opinion in a case involving the same petitioner reported at 13 F. Supp. 252. The opinion of the Circuit Court of Appeals is reported at 92 F. (2d) 748, and will be found at page 66 of the Record.

JURISDICTION.

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on November 24, 1937. The petition for a writ of certiorari was filed January 13, 1938, and was granted February 14, 1938. Jurisdiction of this Court is found in the provisions of Section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925.

QUESTIONS PRESENTED.

Whether petitioner's trial and conviction of the charge of uttering and possessing counterfeit money, where he was unable to secure counsel to represent him, was ignorant of his right to have counsel, and was put on trial the day he was first advised of his indictment without counsel to represent him, was void as being in violation of the Fifth and Sixth Amendments to the Constitution, and whether petitioner, while serving such sentence, is entitled to gain his freedom by writ of habeas corpus.

STATEMENT.

The petitioner filed his petition for the writ of habeas corpus, complaining of his detention in the Federal Penitentiary in Atlanta, Georgia, alleging that he was being held in violation of his constitutional rights. He was arrested in Charleston, South Carolina, on November 21, 1934, together with one Monroe C. Bridwell, charged with feloniously uttering and passing four (4) counterfeit twenty-dollar Federal Reserve notes, and with knowingly and feloniously possessing twenty-one (21) counterfeit Federal Reserve notes, with intent to defraud. At the time

of their arrest, petitioner and Bridwell were in the United States Marine Corps, on leave. A hearing was had before the United States Commissioner, at which the men were represented by counsel of their own choosing. They were bound over to await the action of the United States grand jury and, being unable to give bail, were confined in a local jail. An indictment was rendered against them at the next term of court on January 21, 1935. They knew nothing of this indictment until they were brought into court on January 23rd, at which time they pleaded not guilty, and were placed on trial (R. 41, 48). When brought into court, in their ignorance they thought they were going to appear before the grand jury and that they would then be released, but instead they were informed that they had been indicted and were placed on trial (R. 48).

The men were unable to provide counsel for themselves; the court did not appoint counsel for them; therefore, they were not represented by counsel at the trial. The petitioner, who was thus put in jeopardy of his liberty, had no schooling beyond the fifth grade, and was without any legal knowledge or skill. He was utterly without funds and knew no one in the vicinity of Charleston, where the trial took place. He neither examined witnesses nor testified on his own behalf, nor addressed the jury, although his co-defendant, Bridwell, attempted in a feeble way to speak in defense of himself and of the petitioner (R. 46, 48).

During the trial, according to a statement contained in the opinion of the Circuit Court of Appeals, Bridwell stated that he did not think that men *of such limited knowledge as he and petitioner were* would know counterfeit money when they saw it, and asked that a witness be called to establish whether the money was counterfeit. The District Attorney procured a witness, *who was a deputy sher-*

iff in charge of tax collections, and handled considerable money in performing his duties (R. 69). He testified that the money was counterfeit and that that fact was readily discernible.

In addition to the undisputed facts as hereinabove set out, both petitioner and Bridwell testified that they asked the District Attorney in open court whether they could have counsel appointed for them and he replied that counsel was not appointed in South Carolina except in capital cases. The men also testified that they asked the District Attorney in open court after the trial was under way if they could have witnesses, and that he replied it was then too late. The District Attorney disputed the evidence as to the request for counsel, and both the District Attorney and his assistant disputed the statement that petitioner requested an opportunity to get witnesses. The Assistant District Attorney did not dispute the testimony of Bridwell and Johnson that Bridwell requested the District Attorney for the assignment of counsel. The clerk before whose desk the preliminaries were taking place did not dispute the testimony of the men that they requested counsel. He said, "I don't recall the defendants requesting counsel to represent them in the case. I wouldn't say positively the Judge refused counsel to the defendants" (R. 21). The trial judge, the only other person present who would normally have known what transpired and whose testimony was sought by petitioners, upon the habeas corpus proceeding, was unavailable the day upon which his testimony was to be taken, and petitioner was, therefore, unable to ascertain what his personal recollection of the matter was, if any (R. 29, 35, 36).

A verdict of guilty against petitioner and Bridwell was rendered on the same day, and the men were both sentenced to be imprisoned for four years and six months.

For the following twenty-four hours, petitioner and Bridwell repeatedly asked jailers to get them in touch with a lawyer, all to no avail (R. 42, 44, 49). The second morning after the trial they were transported by automobile from Charleston to Atlanta, a day's trip, and upon arrival there they were placed in quarantine at the Federal Prison. No appeal was taken from this judgment, petitioner having testified upon the habeas corpus proceeding that he knew nothing as to his rights to have counsel at the trial and that he knew nothing as to his rights relating to the filing of a motion for a new trial or prosecuting an appeal.

The petitioner alleged that the judgment of conviction was an absolute nullity on the grounds that he was innocent of the charge, that he was denied compulsory process for obtaining witnesses in his favor, and the right to have the assistance of counsel for his defense, in violation of the Sixth Amendment to the Federal Constitution, and was therefore denied due process of law in violation of the Fifth Amendment to the Federal Constitution. The District Court for the Northern District of Georgia appointed counsel to represent petitioner on the trial of the habeas corpus case and evidence was taken on the hearing. The District Court reached the conclusion that petitioner and Bridwell, who filed a petition at the same time, had been deprived of constitutional rights as alleged, but that, as the trial court had jurisdiction, the judgment was not void, and the errors and irregularities could have been corrected only on appeal. *Bridwell v. Aderhold*, 13 F. Supp. 253. No appeal was taken from this judgment. However, in December, 1936, the application for release on habeas corpus was renewed on the same grounds. Petitioner appeared by counsel and additional evidence was taken and the District

Court again discharged the writ and referred to its opinion in the prior case (R. 56). It is from this decision of the District Court that the present appeal is taken. The decision of the District Court was affirmed by the Circuit Court of Appeals for the Fifth Circuit in its opinion of November 24, 1937. Bridwell has since been released on parole, and his appeal is not being prosecuted.

SPECIFICATION OF ERRORS.

Petitioner contends that the Circuit Court of Appeals erred:

1. In holding that in the trial of petitioner for a non-capital felony the trial court was not required to appoint counsel to represent him.

2. In holding that where the accused was tried for a non-capital felony without the assistance of counsel when he was of limited education and without legal skill or knowledge and without knowledge of his legal rights, and such trial resulted in his conviction, sentence and commitment to the United States Penitentiary for four and one-half (4½) years, petitioner was not entitled to be released upon his petition for writ of habeas corpus.

3. In holding that the judgment of the trial court discharging the writ sought by petitioner was right.

4. In not reversing the judgment of the trial court and releasing petitioner on his writ of habeas corpus.

SUMMARY OF ARGUMENT.

1. Upon the undisputed facts, the failure of the court to assign counsel for petitioner in the trial of his case deprived him of his constitutional rights under the Sixth Amendment.

2. The trial, conviction and sentence of petitioner under the circumstances here disclosed deprived petitioner of his liberty without due process of law in violation of the Fifth Amendment.

3. Petitioner's conviction in violation of the rights guaranteed by the Fifth and Sixth Amendments is a nullity and he is entitled to be released upon writ of habeas corpus.

4. Petitioner is entitled to have his testimony that counsel was requested accepted as true.

ARGUMENT.

The Record contains some inconsistencies and ambiguities which leave in doubt the truth about a number of the facts testified to upon the trial of the habeas corpus proceedings. While petitioner does not waive his contentions as to the truth of these facts, and the fourth division of this argument is devoted to the statement of his contentions in that regard, it is not deemed important in the discussion of the first three branches of the argument to determine whether petitioner's version or that of Respondent is to be believed. For the purpose of the arguments under the first three sections, it will be assumed that the facts are as conceded by the Respondent. Substantially, these facts are: That petitioner was put on trial the day he was first advised of an indictment against him on an offense the maximum penalty for which was thirty (30) years in the penitentiary and the payment of a $10,000.00 fine, after having been kept in jail following a commitment hearing two months previously; that he had no funds with which to hire a lawyer, although he tried to get one to represent him; that upon being apprised in open court of the indictment against him, he pleaded not guilty and an immediate trial was had; that this trial consumed several hours, during which a number of witnesses were called on behalf of the Government; that the prosecution was conducted by the District Attorney and his assistant, both of whom participated actively; that defendant took no part in the trial of the case by examining witnesses or making any statement on his own behalf, although one Bridwell, who was indicted with him, undertook to the best of his ability to conduct a defense for both men; that neither of them had been educated beyond the fourth or fifth grade in school, and neither of them had any legal training or knowledge; that the trial

thus conducted resulted in the conviction of petitioner and was followed by his sentence to four and one-half years in the Federal Penitentiary in Atlanta; that he was kept in the Charleston County jail until the second morning after the trial, at which time he was removed by automobile to the Federal Penitentiary in Atlanta; that petitioner filed no appeal within the time provided by law; and that petitioner knew nothing as to any rights which he had with respect to having counsel assigned for him or the right to appeal.

I.

UPON THE UNDISPUTED FACTS, THE FAILURE OF THE COURT TO ASSIGN COUNSEL FOR PETITIONER IN THE TRIAL OF HIS CASE DEPRIVED HIM OF HIS CONSTITUTIONAL RIGHTS UNDER THE SIXTH AMENDMENT.

The Sixth Amendment to the Constitution provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

Assuming, as we do for the purpose of this present argument, that petitioner made no request for counsel, then it is petitioner's contention that his failure to make such request did not deprive him of the right to have coun-

sel appointed. As is so aptly stated by the Government in its brief in opposition to the petition for certiorari,

> "Criminal defendants will often be ignorant of their rights and the Constitutional protection may at times be drained of content if the defendant must himself take the initiative." Brief for the United States in Opposition, p. 14.

But the Government concludes, in spite of the foregoing statement, that "the Sixth Amendment cannot be stretched to place imperative duty on the trial court either to assign counsel or to obtain an *express* waiver from every unrepresented defendant." (Italics supplied.)

Such a theory has been definitely repudiated by this court in the instance of a waiver of another right guaranteed by the Sixth Amendment, to-wit, the right to trial by jury. In the case of *Patton v. United States,* 281 U. S. 276, the defendant in open court, when represented by competent counsel, stipulated that a trial might proceed before a jury of eleven men, after one of the twelve had become ill, and such stipulation was renewed in open court after the trial judge had fully explained the rights of the parties and had stated that both defendant and the Government were entitled to a constitutional jury of twelve men. In spite of such a studied and unequivocal stipulation, it was a matter of serious concern in this Court whether a trial thus conducted became a nullity. In affirming the power of the defendant to waive a trial of a constitutional jury of twelve men in the *Patton* case, this court made the following significant statement:

> "Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact-finding body in criminal cases is of such importance and has

> such a place in our traditions that, before any waiver can become effective the consent of government counsel and the sanction of the court must be had, *in addition to the express and intelligent consent of the defendant.* And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from the mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity." *Patton v. U. S.*, supra, 312. (Italics supplied.)

If the waiver of the presence of a single juror is to be hedged about with such meticulous safeguards as indicated in the language above quoted, how much more important is it that the waiver of the right to counsel be recognized only with at least the same degree of caution. In the instance of a waiver of any of the other rights guaranteed by the Sixth Amendment, whether it be the right to a jury of twelve, a public trial, confrontation of witnesses, or compulsory process, the presumption may at least be indulged that his rights are known by the accused *if he has counsel present;* but in the instance of a waiver of the right to counsel itself, there is absolutely no safeguard surrounding the accused because, lacking counsel, he cannot even be presumed to know that he is entitled to be represented. Can there be any pretense that in Johnson's trial there was any "*express* and *intelligent* consent of the defendant"? In fact, the Government concedes that there was none, and bases its argument upon the proposition that "the Sixth Amendment cannot be stretched to place an imperative duty on the trial court * * * to obtain an express waiver." This argument is completely answered in the *Patton* case where this Court

says that the correlative right to trial by jury also granted by the Sixth Amendment must be adhered to unless in the case of *express* and intelligent waiver.

That the precise question here presented has not previously been before this Court for determination is convincing evidence of the well-nigh universal recognition by the lower Federal courts of the fundamental character of the right. The action of the trial court in putting Johnson in jeopardy without representation has, in effect, been condemned by every court and official who has had occasion to give consideration to it. The trial court in the habeas corpus proceeding held that the petitioner had been deprived of his constitutional right; the Circuit Court of Appeals in its opinion said, "Perhaps it would have been better if he (the trial judge) had done so (appointed counsel for petitioner) on his own motion"; the United States in its brief in opposition says, "* * * it may be a wholesome practice to require that every criminal defendant accused of felony must either be represented by or expressly refuse counsel * * *." The Department of Justice, doubtless based upon the facts of this case, has directed the United States attorneys to call to the attention of trial courts the wisdom of having counsel appointed or obtaining an express waiver from the accused (Department of Justice Circular #2946, dated March 4, 1937, set out in appendix to Government's brief in opposition).

Thus universally has the action of the trial court been criticized. Such criticism springs from a natural conception of the fundamental rights that are guaranteed to an accused under our system of justice.

Aside from the question of waiver, which has been discussed above, the Government apparently goes further and

takes the position that the Sixth Amendment does not operate directly upon the courts at all, but simply prohibits Congress from enacting a *statutory* denial of the right to counsel. (See Government's brief in opposition to the granting of certiorari, p. 15.) There is of course nothing in the language of the Sixth Amendment to suggest that its operation is so restricted. Furthermore, at pages 13 and 14 of the Government's brief in opposition, the Government concedes that if the petitioner requested counsel and was refused counsel, then there would be a violation of the Sixth Amendment; and this of course would be true whether or not Congress had enacted any statutory provisions with respect to the right to counsel. Thus it appears by the Government's own concession that the Sixth Amendment does not restrict the Congress alone, but on the contrary operates directly upon the courts regardless of any action or nonaction by Congress. Also, in the *Patton* case, supra, this Court has held that the rights guaranteed by the Sixth Amendment may not constitutionally be denied a defendant except upon his express waiver, and in so holding, this Court has clearly indicated that the Sixth Amendment operates directly upon the trial courts, and is not limited in its operation to what the Congress may or may not do by statute.

The suggestion that the Sixth Amendment, in guaranteeing the right of counsel, is limited in its operation to capital cases, is entirely without foundation since the Amendment specifically provides that it shall apply in "all criminal prosecution."

Moreover, the suggestion that the provision in question was intended to do no more than to prevent the adoption of the old English common law rule, which denied the privilege of representation in treason and other capital

cases, is not tenable because as is clearly shown in the opinion in *Powell v. Alabama*, 287 U. S. 45, at p. 64, this harsh and inhuman rule of the English common law had already been repudiated in twelve of the thirteen American colonies.

Decisions of the courts of last resort of the states mentioned in the Government's brief in opposition are not at all uniform in their holdings. It has been impossible to make an exhaustive survey of all of the state decisions reflecting the courts' views on this question, but a number of cases which are deemed to be pertinent and which tend to support petitioner's views under various state constitutions are cited in the note below.* While respectful consideration should be given to the state decisions, it is submitted that the principles contended for by petitioner here have been too well recognized by this Court to be weakened by any contrary state court opinion.

It seems clear that upon the authority of the *Patton* case the Sixth Amendment placed upon the trial court a duty to insure to petitioner representation of counsel unless he *expressly* waived the privilege. It is conceded that there was no such express waiver.

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* Batchelor v. State, 189 Ind. 69; Commonwealth v. Richards, 111 Pa. Super. 124; Commonwealth v. Valerio, 118 Pa. Super. 34; Commonwealth v. Cohen, 123 Pa. Super. 5; Williams v. State, 163 Ark. 623; Cass v. Commonwealth, 236 Ky. 462; Stephenson v. State, 4 Ohio App. 128; Cassidy v. State, 201 Ind. 311; Bielich v. State, 291 Ill. 471; Cook v. State, 48 Ga. App. 224; Reliford v. State, 140 Ga. 777.

II.

THE TRIAL, CONVICTION AND SENTENCE OF PETITIONER UNDER THE CIRCUMSTANCES HERE DISCLOSED DEPRIVED PETITIONER OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AMENDMENT.

It of course makes little difference to the petitioner here whether it be found that his trial, conviction and sentence were void because of a denial of his rights under the Sixth Amendment, or because of a denial of due process as guarteed by the Fifth Amendment to the Constitution. Petitioner contends that on either count he is entitled to his freedom.

The Fifth Amendment provides that,

> "No person shall be deprived of life, liberty or property without due process of law."

Whatever might have been thought the law prior to *Powell v. Alabama*, 287 U. S. 45, it was by that decision established that in a proper case "the aid of counsel is essential to due process." 287 U. S. at p. 68. The issue of whether the petitioner in the instant case was deprived of his constitutional rights is therefore presented under both the Fifth and Sixth Amendments, and, upon the facts, it must be held, it is submitted, that he was deprived of those rights.

In addition to the *Powell* case, this Court has recently decided two other cases affecting the rights of defendants in state criminal cases. Both of them, it may be stated, have given new meaning to the requirements of due process. In *Brown v. Mississippi*, 297 U. S. 278, the accused

had been convicted solely upon confessions obtained by third-degree methods and his constitutional right against self-incrimination was thus denied. The accused was represented by counsel, and it was contended that failure by counsel to move for the exclusion of the confessions operated as a waiver of the constitutional right against self-incrimination. The Supreme Court held that the denial of this right was not a mere error which could be thus waived by the attorneys for the accused, but was an error which rendered the trial a nullity. Mr. Chief Justice Hughes said, at page 286:

> "That complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceedings a mere pretense of a trial and rendered the conviction and sentence wholly void. *Moore v. Dempsey, supra.*"

In *Mooney v. Hollohan*, 294 U. S. 103, this Court held that the requirements of due process could not be deemed to be satisfied

> "* * * by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured."

In a much older case, *Moore v. Dempsey*, 261 U. S. 86, the prisoners had been sentenced after a trial dominated by a mob. The trial court had jurisdiction of the offense and the accused, but the Supreme Court held that the mob domination of the trial deprived the prisoners of their liberty without due process of law and reversed the order of the lower court dismissing a petition for habeas corpus.

This Court, in the *Powell* case, did not, of course, fix any rule relating to representation by counsel beyond the extreme facts there present. Substantially all of the reasoning of that opinion applies, however, with equal force to any case in which an accused is placed on trial for the commission of a felony without the opportunity to be heard by counsel. This Court said:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guilding hand of counsel at every step in the proceedings against him." *Powell v. Alabama*, 287 U. S. 45, 69.

The true test of whether the presence of counsel is essential to the substance of a hearing is whether the denial of the right violates those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Hebert v. Louisiana*, 272 U. S. 312, quoted in the recent case of *Palko v. Connecticut*, ... U. S. ..., U. S. Supreme Court, October Term, 1937, No. 135.

The trial court, upon the hearing of the petition for habeas corpus, found that upon the facts here present there was such a violation of fundamental rights. In his opinion Judge Underwood said:

"I am of the opinion, therefore, that petitioners were deprived of their constitutional rights. * * *" 13 F. Supp. 253, 255.

If this conclusion of the trial court is wrong, it is difficult to determine what circumstances would bring a case within the rule of the *Powell* decision. Surely the fact that the crime may call for the death penalty is not a necessary circumstance, because the Fifth Amendment deals with liberty just as surely as it does with life. Certainly the element of disorder and mob spirit at the trial is not an essential, for so far as appears from the decisions in cases which have been similarly dealt with, the accused has been found to have been denied due process where there was no element of threatened violence at the trial. *Brown v. Mississippi,* supra; *Mooney v. Holohan,* supra. Complete illiteracy is not a test, for there is no contention that Mooney was illiterate or ignorant.

Petitioner contends that no matter what other circumstances may be present in the particular case, due process demands the appointment of counsel by the trial court wherever an accused is put on trial for the commission of a felony where he is otherwise unable to procure counsel and unless he gives his express and intelligent consent to proceed on his own behalf without representation. There is no dispute in this case but that petitioner here comes within such classification.

III.

PETITIONER'S CONVICTION IN VIOLATION OF THE RIGHTS GUARANTEED BY THE FIFTH AND SIXTH AMENDMENTS IS A NULLITY AND HE IS ENTITLED TO BE RELEASED UPON WRIT OF HABEAS CORPUS.

Assuming that petitioner has been deprived of his constitutional rights, the question still remains whether this abuse can be corrected by habeas corpus. The trial court was troubled by this question, and, in fact, discharged the writ on the assumption that the error was one which could be corrected only by appeal. The United States in its brief in opposition has greatly simplified our problem in this respect, by substantially conceding this point. On page 17 of its brief in opposition, the Government, with generous frankness, says,

> "If a violation of the Sixth Amendment because of failure to assign counsel were assumed, then, since the absence of counsel would affect the taking of steps for appeal within the prescribed time (Crim. Apps. Rule III), the rule of *Moore v. Dempsey* and Mooney v. Holohan might be applicable so as to admit of habeas corpus proceedings."

It is difficult to see how any other review could be taken of the matter. The District Court in its opinion pointed out that

> "the technicalities involved in the trial *and subsequent proceedings for new trial or appeal were such as to require the appointment of counsel as an essential element of the trial.*" 13 F. Supp. 253, 255. (Italics supplied.)

In spite of the recognition of this principle, the court held

that the error was one that could be corrected only by appeal. The decision of the trial court has the effect of saying that the Constitution protects a defendant against his ignorance of his right to have counsel assigned at his trial, but upon his conviction regards him not only as a sadder but a wiser man—wise enough, indeed, to know not only that he has already been deprived of his constitutional right to counsel, but also that he now has the right to have counsel appointed who will, by motion for new trial or appeal, secure for him a new trial at which he will have counsel. Plainly, the decision of the court below completely destroys the substance of the right to counsel.

The question presented is whether a judgment of conviction entered in a trial conducted in violation of the requirements of due process of law is such that it "is void and may be questioned collaterally." It is respectfully submitted that the precise question has been answered in the affirmative by the Supreme Court.

Where circumstances surrounding the trial take from it the essential elements necessary to constitute a hearing such as is demanded by due process, this Court has not hesitated to entertain a collateral attack. Thus in *Moore v. Dempsey*, 261 U. S. 86, where the pressure of a riotous mob turned the trial into a mere sham, and in *Mooney v. Holohan*, 294 U. S. 103, where the deception of court and jury by the intentional use of perjured testimony was held to make of the trial a mere pretense, this Court held that the accused could question the cause for his detention through habeas corpus proceedings. In neither of these cases did this Court decline to entertain the petition on the ground that by so doing the writ would be used as a substitute for a writ of error, although in both cases it is unquestioned that at the time of the original trial, the trial court had jurisdiction of the accused and of the sub-

ject matter. The trial court in both cases lost jurisdiction when the circumstances arose that turned the trial into a mere pretense. So it was when Johnson and Bridwell were placed on trial without counsel. The trial court no longer had jurisdiction to entertain a verdict or to pass judgment or sentence. Such actions were completely void. As was said in the case of *Hans Nielsen, Petitioner,* 131 U. S. 176,

> "It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights, than an unconstitutional conviction and punishment under a valid law. In the first case, it is true, the court has no authority to take cognizance of the case; but, in the other, it has no authority to render judgment against the defendant. This was the case in *Ex parte Lange,* where the Court had authority to hear and determine the case, but we held that it had no authority to give the judgment it did. It was the same in the case of *Snow:* The Court had authority over the case, but we held that it had no authority to give judgment against the prisoner. *He was protected by a constitutional provision, securing to him a fundamental right. . It was not a case of mere error in law, but a case of denying to a person a constitutional right. And where such a case appears on the record, the party is entitled to be discharged from imprisonment.*" (Italics supplied.)

Moreover, this Court has pointed out the similarity between the denial of due process through mob domination and such denial by failure to appoint counsel:

> "* * * a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm

> spirit of regulated justice, but to go forward with the haste of the mob'' (287 U. S., at p. 59).

The complete answer, however, to the contention made below but which the Government does not make here, to-wit, that even if petitioner has been deprived of his constitutional rights, he cannot obtain his freedom by habeas corpus, is that if he cannot obtain it in that manner, then he is absolutely helpless, for without counsel he cannot preserve the necessary record for appeal and he cannot prepare his appeal after trial under the appropriate rules of court. It seems clear that a right as vital as those guaranteed by the Fifth and Sixth Amendments cannot be so lightly brushed aside.

IV.

PETITIONER IS ENTITLED TO HAVE HIS TESTIMONY THAT COUNSEL WAS REQUESTED ACCEPTED AS TRUE.

As pointed out in divisions I and II of this argument, petitioner contends that even though all the disputed issues were resolved against him, he would nevertheless be entitled to relief because the particular circumstances about which there is dispute are not essential to show a denial of due process. However, petitioner recognizes that the exact circumstances of the trial are of importance, and, moreover, the Government in effect concedes his right to be released if the facts are as he alleges them to be. It is said on page 13 of the brief in opposition,

> ''If the petitioner's testimony were believed, we would assume that his conviction was in violation of the Sixth Amendment.''

It is then stated that neither the Government nor this Court is entitled to accept it as true, because it is contradicted by the District Attorney. It is of course unfortunate that the conflicting testimony was not resolved by the District Court. He found it unnecessary to do so because he found that petitioner had been deprived of his constitutional rights in any event. However, he did repeat the contention of petitioner in his written opinion and also commented on the District Attorney's denial. In view of the fact that the Government concedes that if petitioner's testimony is correct, he is entitled to his freedom, it seems important to comment briefly on the circumstances which seem to support his testimony. In the first place, both he and Bridwell testified that Bridwell asked the District Attorney if they could have a lawyer, and that the District Attorney replied that in the state of South Carolina counsel was not appointed except in capital cases. The very reasonableness of this reply in the light of the actions of the trial court bespeaks its truthfulness and sincerity. It is hardly likely that these men could have imagined any such reply by the District Attorney. It is also significant that when the testimony of the Assistant District Attorney was taken as to the happenings at the original trial, he was not asked as to his recollection on this point, and he did not testify whether or not he heard the question by Bridwell, although he did testify that he was present and participated in the entire trial. Moreover, the testimony of the Clerk before whose desk the colloquy took place tended to indicate the truth of Bridwell's testimony rather than the opposite. He stated, "I wouldn't say positively the judge refused counsel to the defendants" (R. 21).

Petitioner takes the position that since the Government concedes that he is entitled to the relief sought if the tes-

timony introduced on his behalf is true, then in any event, if the truth or falsity is deemed by this Court to be important, the decision of the Circuit Court of Appeals should be reversed and the case should be remanded to the trial court to resolve the question of fact.

CONCLUSION.

Petitioner shows that he was put on trial in a felony involving the gravest consequences without a lawyer to assist him in the preparation of his defense, to conduct the trial, or to assist him in the intricacies of an appeal, and that he did not expressly or intelligently waive the right to be so represented. He has shown that this right was denied him under circumstances that amount to a denial of due process of law, and having shown that, it seems that as a matter of common justice he is entitled to be released upon his writ of habeas corpus.

Respectfully submitted,

ELBERT P. TUTTLE,
Counsel for Petitioner.

Of Counsel:
SUTHERLAND, TUTTLE & BRENNAN.

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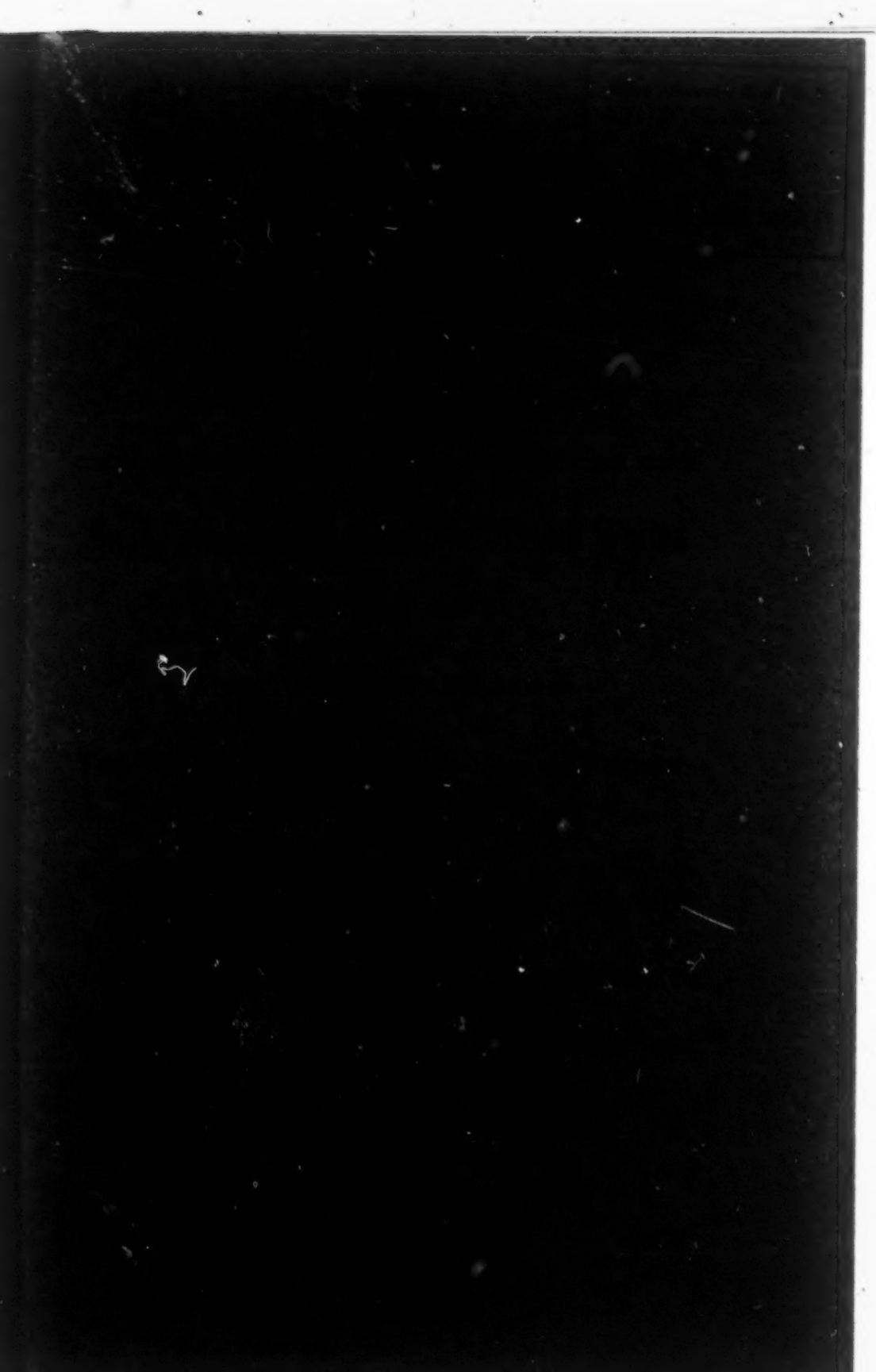

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In the Supreme Court of the United States

OCTOBER TERM, 1937

JOHN A. JOHNSON, PETITIONER

v.

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court's order discharging the writ of habeas corpus and remanding the petitioner (R. 56–57) is based on its opinion reported at 13 F. Supp. 253, discharging a similar writ issued as to the petitioner. The opinion of the Circuit Court of Appeals (R. 65–70) is reported at 92 F. (2d) 748.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 24, 1937 (R. 70). The petition for a writ of certiorari was filed in this Court January 13, 1938. The jurisdiction of this Court

is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Petitioner was convicted of uttering and possessing counterfeit money. At the trial he was not represented by counsel. The questions are whether, under the circumstances of this case, the conviction was in violation of the Fifth or the Sixth Amendment, and whether, if there were such a violation, the error may be corrected on habeas corpus proceedings.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusaton; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

STATEMENT

The petitioner and one Monroe C. Bridwell were arrested at Charleston, South Carolina, on November 21, 1934, charged with feloniously uttering and passing four counterfeit $20 Federal Reserve notes

and with knowingly and feloniously possessing 21 Federal Reserve Bank notes with intent to defraud. A hearing was held by the United States Commissioner at which they were bound over to wait the action of the grand jury and were confined in the local jail in the absence of bail (R. 5, 66). At the hearing petitioner and Bridwell were represented by counsel, who continued to represent them until the 14th of the following January (R. 5, 41, 44.) An indictment in two counts was returned against petitioner and Bridwell at the next term of court (R. 53–55). On January 23, 1935, petitioner and Bridwell were brought to court, pleaded not guilty, and were tried to a jury, which returned a verdict of guilty (R. 20, 23, 55). Petitioner was sentenced to imprisonment for four years and six months. No appeal was taken from this sentence (R. 21, 55). In June, 1935, petitioner, being confined in the United States Penitentiary at Atlanta (R. 7–8, 18, 56), filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Georgia (R. 7). The court appointed counsel to represent him, and on December 19, 1935, the petition was denied (R. 8; 13 F. Supp. 253). In December, 1936, the petition for a writ of habeas corpus which is the subject of this appeal was filed (R. 4–9). On April 3, 1937, the second writ of habeas corpus was discharged and the petitioner remanded to the custody of the respondent, the court holding that the case did not substantially differ from the previous one (R. 56–57).

Both petitioner and Bridwell appealed to the Circuit Court of Appeals for the Fifth Circuit. The appeals were consolidated and heard on the same record (R. 2–3, 65–66). On November 24, 1937, that court affirmed the judgment of the District Court. Bridwell is not a party to the petition to this Court for a writ of certiorari (R. 52), having been released on parole.

The basis of the petition for writ of habeas corpus below and for the writ of certiorari in this Court is that the right to the assistance of counsel accorded petitioner by the Fifth and Sixth Amendments was denied, thus rendering the judgment on which he stands committed null and void. The record, in its aspect most favorable to the petitioner, may be summarized as follows:

Petitioner and Bridwell were arrested on November 21, 1934 (R. 5). The next day they retained counsel and paid him a fee of $100 (R. 43). He represented the prisoners at the hearing before the United States Commissioner (R. 43–44). The Commissioner bound them over for the grand jury; they remained in jail because unable to give bond (R. 5). The counsel visited them two or three times in jail. He advised them to plead guilty. They refused. According to Bridwell's testimony, counsel refused to represent them if they would not plead guilty and if they could not get any money. On January 14, 1935, counsel withdrew from the case (R. 44).

On January 21, 1935, petitioner and Bridwell were indicted by the grand jury. Their petition and testimony is to the effect that they were not informed of this indictment until they were called for trial on January 23, 1935 (R. 5, 48–49). At the trial the court read the indictment to the defendants, and they pleaded not guilty (R. 29). The judge asked them if they had counsel, to which they replied that they had not. The court did not offer to appoint counsel or advise the defendants that they had a right to have counsel appointed (R. 5–6). Petitioner and Bridwell testified on the habeas corpus proceeding that Bridwell requested the District Attorney for counsel, and that he replied that in South Carolina counsel was not appointed except in capital cases (R. 41, 45, 49). The United States Attorney denied that any request for counsel was made (R. 23, 28). The clerk of the court recalled no request made of anyone, and is sure that none was made of him (R. 21). The Assistant United States Attorney stated that no request for counsel was made of him (R. 33). The court asked the prisoners if they were ready to go to trial (R. 27); they replied that they were (R. 27), or that they were as ready as they could be (R. 42).

During the course of the trial Bridwell acted as attorney for himself and petitioner. He testified in his own behalf, questioned witnesses for the Government, and addressed the jury at the close of the

case (R. 25, 33). Bridwell testified that he objected to the testimony of one witness because it was false and that his summation was limited to fifteen or twenty words. He also testified that he asked the District Attorney if he could get witnesses, and that he was told that it was too late (R. 46, 47). The United States Attorney testified that he was not asked by the defendants to have witnesses subpoenaed (R. 23, 26, 28); the Assistant United States Attorney similarly testified that he was not asked (R. 34). Upon Bridwell's statement that he could not tell that the money was counterfeit, the trial court sent for a deputy sheriff in charge of tax collections, who was familiar with handling money, and who testified that the defendants could have told that the money was counterfeit; the testimony is in conflict as to whether Bridwell or the United States Attorney made the suggestion that one familiar with money be called (R. 34, 46–47). The clerk of the court testified that Bridwell conducted the defense about as well as the average layman (R. 22); the United States Attorney that he showed extraordinary ability for one who was not a lawyer, evidencing a familiarity with the rules of evidence and procedure (R. 25–26); and the Assistant United States Attorney that Bridwell showed a great knowledge, or more knowledge than the normal layman, of court procedure (R. 33). Petitioner was a marine and has had a fifth grade schooling (R. 48); Bridwell was a corporal in the

marine corps and had been educated in a country school until the age of fifteen; he supposed that he had reached the equivalent of the fourth or fifth grade (R. 44, 46). The United States Attorney testified that, because the defendants were without counsel, he took especial pains to see that they had a fair trial, and avoided everything that was even questionable under the law (R. 24–25).

After conviction, the defendants were returned to the county jail at Charleston. Two days later they were taken to the Federal penitentiary at Atlanta (R. 7, 15, 43). Bridwell and petitioner testified that in the interval they repeatedly asked the jailers to communicate with Major Myers, a lawyer; that they asked a telegraph messenger boy to deliver a message to Myers, but that the messenger could not locate him (R. 42–43, 44–45, 49). The county jailer testified that the prisoners did not request him that they be put in touch with a lawyer, although he made a daily inspection of the jail, seeing each prisoner, and that he saw the petitioner and Bridwell frequently (R. 40). The assistant jailers, who were not in Atlanta for the hearing, did not testify.

Upon delivery in Atlanta, the petitioner and Bridwell were quarantined, as is the customary health procedure. They were allowed to write letters during this period (R. 45, 51). Prison records show that Bridwell wrote his first letter on

February 1, 1935, and petitioner on January 28,[1] 1935 (R. 51). Petitioner testified that he had the impression from other inmates that he could not write out about his case (R. 50); Bridwell, that he wanted to wait until he knew a little more about the matter (R. 43, 47). After release from quarantine, one or the other of the prisoners wrote the clerk or the trial judge to get the indictment papers and, subsequently, to ask that the case be appealed (R. 45, 50). The records of the court indicate that the appeals were filed on May 15, 1935 (R. 29). On May 20, 1935, the clerk wrote Bridwell that the petitions for new trial and, if that were refused, for an appeal, were denied by the judge because the court was without jurisdiction (R. 30). The judge directed that this letter be sent and told the clerk the papers were filed too late (R. 37–38).

Bridwell was released on parole on April 23, 1937. Petitioner will be entitled to discharge in July 1938 (R. 52).

ARGUMENT

I

While it may be a wholesome practice to require that every criminal defendant accused of felony must either be represented by or expressly refuse

[1] The record reads February 28, but evidently means January, since the witness spoke of *subsequent* letters on the 7th, 14th, 17th, and 25th of February (R. 51).

counsel,[2] it is relatively clear that there has been no violation of the Fifth Amendment. The Court in *Powell* v. *Alabama,* 287 U. S. 45, set out the factors which shape the decision on this question as follows (p. 71):

> In the light of the facts outlined in the forepart of this opinion—the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives—we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process.
>
> But passing that, and assuming their inability, even if opportunity had been given, to employ counsel, as the trial court evidently did assume, we are of opinion that, under the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment. Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine. All that it is necessary now to decide, as we do decide, is that

[2] Department of Justice Circular No. 2946, dated March 4, 1937, set out in the Appendix, *infra*, pp. 18–19, directs the United States Attorneys to follow such practice.

> in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; * * *.

Here there was no race prejudice. There was no public hostility, or presence of the military forces. The defendants were not illiterate; their ignorance is at least debatable. This was not a capital case. There is no suggestion that the court or the jury was inflamed or hostile. The absence of each of the factors emphasized in *Powell* v. *Alabama* indicates to us that there has been no denial of a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts,* 291 U. S. 97, 105; *Palko* v. *Connecticut,* No. 135, October Term, 1937.

This view is reinforced by the large number of state cases which hold that the trial court need not assign counsel unless it is requested and a satisfactory showing as to need made. *Bethune* v. *State,* 26 Ala. App. 72, certiorari denied, 228 Ala. 422; *Weatherford* v. *State,* 76 Fla. 219; *Gatlin* v. *State,* 17 Ga. App. 406; *Bailey* v. *State,* 50 Ga. App. 92; *Marovich* v. *State,* 202 Ind. 274; *Grogan* v. *Commonwealth,* 222 Ky. 484; *Holland* v. *Commonwealth,* 241 Ky. 813; *State* v. *Davis,* 171 La. 449; *People* v. *Williams,* 225 Mich. 133; *Dugan* v. *State,*

151 Miss. 781; *State* v. *Terry,* 201 Mo. 697; *State* v. *Steelman,* 318 Mo. 628; *State* v. *Fowler,* 59 Mont. 346; *State* v. *MacKinnon,* 41 Nev. 182; *State* v. *Raney,* 63 N. J. L. 363; *United States* v. *Go-Leng,* 21 Phillip, Rep. 426; *State* v. *Jones,* 172 S. C. 129; *State* v. *Sweeney,* 48 S. D. 248; *Brady* v. *State,* 122 Tex. Crim. App. 275; *Barnes* v. *Commonwealth,* 92 Va. 794; *State* v. *Yoes,* 67 W. Va. 546; *James* v. *State,* 27 Wyo. 378. The courts of only one jurisdiction, so far as we have found, hold, in the absence of a specific statute, that it is incumbent upon the trial judge to inform the defendant of his right to counsel. *Commonwealth* v. *Richards,* 111 Pa. Super. 124; *Commonwealth* v. *Valerio,* 118 Pa. Super. 34; *Commonwealth* v. *Cohen,* 123 Pa. Super. 5.

In view of this widely accepted rule, with so little authority to the contrary, it seems difficult to hold the failure to assign counsel, in the absence of a request, to be a violation of due process. At the very most, it might be thought to be in the category where there would be a denial of due process if the defendant could show that he was prejudiced by the absence of counsel to represent him. Compare *Snyder* v. *Massachusetts, Palko* v. *Connecticut,* both *supra.* Here the petition for a writ of habeas corpus, the evidence and the petition for certiorari are all silent as to any claim that the presence of counsel would have altered the result of the trial.

II

Petitioner's principal contention is that there has been a violation of the Sixth Amendment. It seems, however, in the view which must be taken of the evidence in this case, that there has been no such violation.

1. This Court has indicated that the right to assistance of counsel, guaranteed by the Sixth Amendment, may be waived. *Schick* v. *United States,* 195 U. S. 65, 72; *Patton* v. *United States,* 281 U. S. 276, 310. Whether the right has been waived in this case depends upon the conclusion to be drawn from the record. The evidence is compatible with either view, and there has been no ruling of a trial court to resolve the conflicting testimony. In *Bridwell* v. *Aderhold,* 13 F. Supp. 253 (N. D. Ga.), the court did not pass on the conflict in testimony, but held (1) that counsel was required in any event, but that (2) habeas corpus proceedings were insufficient to reach this error since the court had jurisdiction. This decision was followed in the present proceeding (R. 56–57).

The undisputed evidence shows that petitioner and Bridwell had counsel at the hearing before the Commissioner and thereafter but that he withdrew before their trial. At this trial they were not represented by counsel and were not asked if they wanted counsel. The court read the indictment to the defendants; they were asked if they had counsel, to which they answered no; and they were

asked if they were ready for trial, to which they replied in the affirmative. Bridwell conducted a defense for the defendants. This skeleton of the events is clear from the undisputed testimony.

A waiver could reasonably be inferred from the testimony offered in this case. Petitioner and Bridwell well understood the desirability of counsel; they retained one the day after arrest. He advised them to plead guilty. They refused and he withdrew. Bridwell seems to have had a knowledge of legal procedure at least the equivalent of that of the ordinary layman. Yet, according to the testimony for the Government, they made no request for counsel before or during the trial. This failure even to inquire as to the possibility of having counsel assigned might well indicate a deliberate choice to forego the assistance of counsel.

If, on the other hand, the testimony of petitioner and Bridwell were believed, there was no waiver of the right to be assisted by counsel. Because they did not know of their indictment, they made no request for counsel before the day of their trial. At the trial they asked the United States Attorney as to their right to counsel; he said they were not entitled to this. They were also told it was too late to subpoena witnesses. The defense conducted by Bridwell was inadequate. Their repeated requests of the jailers, after conviction, for contact with counsel were ignored.

If the petitioner's testimony were believed, we would assume that his conviction was in violation

of the Sixth Amendment. But neither the Government nor this Court is entitled to accept this testimony as true. In its crucial parts it is flatly contradicted by the United States Attorney. He is not only an officer of the court in which the trial was had but an officer of the United States. It seems evident that much more than the testimony of interested co-defendants would be required to refute his evidence.

2. It must, therefore be taken as established that the defendants made no request for counsel. The question which remains is whether, in a non-capital felony case, the failure of the court to assign counsel in the absence of a request by the defendants violates the Sixth Amendment.

If the matter were to be decided as an original proposition, without reference to history or to the decisions of other courts, it might be held that the failure of the defendants to request counsel would not be a waiver of the rights secured under the Sixth Amendment. Criminal defendants will often be ignorant of their rights and the constitutional protection may at times be drained of content if the defendant must himself take the initiative. But we conclude that the Sixth Amendment cannot be stretched to place an imperative duty on the trial court either to assign counsel or to obtain an express waiver from every unrepresented defendant.

a. The origin of the provision seems clear. It was designed to provide a guaranty against trans-

planting the practice of English treason cases, where the accused was denied the privilege of representation by counsel. See *Patton* v. *United States,* 281 U. S. 276, 307. Directed against this abuse, the clause can hardly be supposed to place upon the court the *duty* of insuring that the defendant has counsel.

b. The first ten Amendments to the Constitution were proposed by Congress [3] in September 1789 (1 Stat. 97). A few months later, on April 30, 1790, Congress enacted that persons accused of crime should have the privilege of counsel and that in treason and other capital crimes the court should assign counsel if the defendant were not represented (c. 9, Sec. 29, 1 Stat. 112, 118; R. S. Sec. 1034; U. S. C., Title 18, Sec. 563). It is most unlikely that Congress would have made this provision if an amendment shortly to be ratified would have made assignment of counsel compulsory in all criminal cases.

c. The decisions of state courts, discussed above (pp. 10–11), were all made under constitutional provisions more or less comparable to the Sixth Amendment. If eighteen state courts are of the view that a constitutional provision guaranteeing the privilege of representation by counsel does not require that the judge assign counsel in the absence of a request, while the courts of only one State hold

[3] The debates on the proposal which became the Sixth Amendment disclose nothing relevant to the present question. 1 Debates in Cong. (O. S.) 784–785.

to the contrary, it is difficult to urge that this Court should construe the Federal Constitution differently.

3. Accordingly, the Government is of the view that the Sixth Amendment is not violated unless the defendant requests and is refused the assignment of counsel. While we are not satisfied with the ambiguities contained in this record, it seems clear that the testimony of petitioner cannot be accepted in the face of the contradictory testimony of the United States Attorney, and it must be taken that there was no request for the assignment of counsel.

III

The court below held that habeas corpus could not be substituted for appeal except in extraordinary circumstances (R. 69). This is the rule that has heretofore obtained. Even the cases, *Moore* v. *Dempsey,* 261 U. S. 86, and *Mooney* v. *Holohan,* 294 U. S. 103, which are the outstanding exceptions to the rule were marked by characteristics not evident in the record of the instant case. Each of these cases involved such a departure from the orderly course of an impartial judicial trial as to warrant the inference that there had been a breakdown of the machinery of justice. In each case the result, the conviction, was largely the result of such failure of judicial machinery. In the case at bar there is no sufficient showing in the record that there was a breakdown of judicial procedure whereby the petitioner was convicted of an offense

which he did not commit. There are no "extraordinary circumstances" which might bring this case within the rule of these cases.

If a violation of the Sixth Amendment because of failure to assign counsel were assumed, then, since the absence of counsel would affect the taking of steps for appeal within the prescribed time (Crim. Apps. Rule III), the rule of *Moore* v. *Dempsey* and *Mooney* v. *Holohan* might be applicable so as to admit of habeas corpus proceedings.

CONCLUSION

The only inference which is permitted by this record is that petitioner failed to request that counsel be assigned. The parties are agreed that the trial judge might more appropriately have assigned, or offered to assign, counsel even in the absence of a request. But the failure of the court to assign counsel does not violate the Fifth or the Sixth Amendments. Accordingly, we see no course but respectfully to submit that the petition for a writ of certiorari should be denied.

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FEBRUARY 1938.

APPENDIX

DEPARTMENT OF JUSTICE,
Washington, D. C., March 4, 1937.

Circular No. 2946

To all United States attorneys:

Certain cases have arisen recently indicating that in some instances the District Courts do not appoint counsel for defendants in criminal cases who appear without an attorney, unless the defendant expressly requests such appointment. In most of the Districts, however, it is customary to appoint counsel in each case in which the defendant has not retained counsel, unless he expressly states that he wishes to conduct his own defense.

It would seem that the latter procedure is the better practice. When in any given case such practice is not followed, you are directed to bring the matter to the attention of the court, in order that the defendant may have the assistance of counsel for his defense. In the case of *Powell* v. *Alabama*, 287 U. S. 45, the Court said:

> The necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment.

These words would apply with equal force to the Fifth Amendment. While it may be that the right "to have the assistance of counsel for his defense", which is guaranteed by the Sixth Amendment, may be waived, and while it may be that the practice

followed in most of the jurisdictions is more than a compliance with the constitutional requirement, the Department of Justice is under a particular obligation to see that no man who needs counsel is without such assistance.

HOMER CUMMINGS,
Attorney General.

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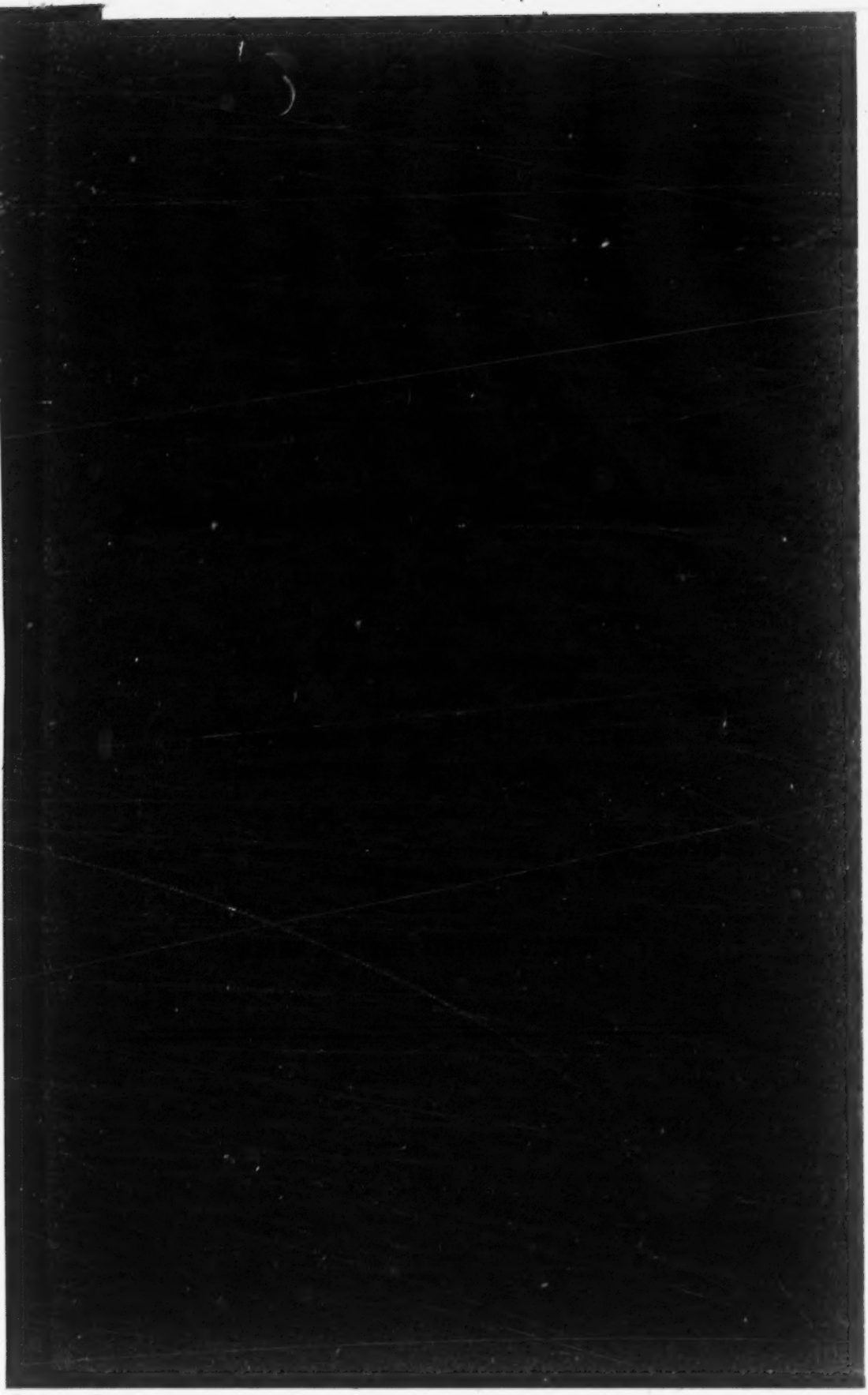

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 699

JOHN A. JOHNSON, PETITIONER

v.

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The District Court's order discharging the writ of habeas corpus and remanding the petitioner to custody (R. 56–57) is based on its opinion reported at 13 F. Supp. 253, discharging a similar writ issued as to petitioner. The opinion of the Circuit Court of Appeals (R. 65–70) is reported at 92 F. (2d) 748.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 24, 1937 (R. 70). The petition for a writ of certiorari was filed in this Court

January 13, 1938. It was granted February 14, 1938 (R. 73). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Petitioner and his codefendant were tried for a felony in a United States District Court. They were represented and advised by counsel before their trial. They appeared in court at the time of the trial without counsel, made no request of the judge or showing for the assignment of counsel, and, in response to questions by the trial judge, announced that they had no counsel and were ready to proceed. Petitioner's codefendant conducted the defense, examined witnesses, and addressed the jury. The questions presented are:

1. Whether, under these facts, the right to assistance of counsel was denied.

2. Whether, if error was committed by the trial judge in not assigning counsel upon its own initiative in the absence of a request by the petitioner, such irregularity divested the court of jurisdiction so that its judgment should be set aside by proceedings in habeas corpus.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *

The Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT

The undisputed facts, as well as those as to which there is a conflict in testimony, were summarized in the opinion of the Circuit Court of Appeals (R. 66–68). As the petitioner does not question the accuracy of this summary, the Government adopts it as the statement of the relevant facts. For the convenience of the Court references to the record have been inserted.

"Appellants were arrested in Charleston, South Carolina, on November 21, 1934, charged with feloniously uttering and passing four counterfeit $20.00 Federal Reserve notes and with knowingly and feloniously possessing 21 counterfeit Federal Reserve Bank notes, with intent to defraud. A hearing was had before a United States commissioner, at which they were represented by counsel of their own choosing. They were bound over to await the

action of the United States grand jury and, being unable to give bail, were confined in a local jail (R. 5, 66). An indictment was returned against them at the next term of court (R. 53–55) and on January 23, 1935, they were brought into court, pleaded not guilty and were tried to a jury, with the result that a verdict of guilty was rendered (R. 21, 33, 55). They were sentenced to be imprisoned in the Atlanta penitentiary for four years and six months. No appeal was taken from this judgment (R. 21, 55). In December, [June] 1935, they filed petitions in the United States District Court for the Northern District of Georgia, seeking release on habeas corpus (R. 7). The petitions alleged that the judgment of conviction was an absolute nullity, on the grounds that they were innocent of the charge and were denied compulsory process for obtaining witnesses in their favor and to have the assistance of counsel for their defense, in violation of the 6th Amendment; and were therefore denied due process of law, in violation of the 5th Amendment. The District Court appointed competent counsel to represent them on the trial of the habeas corpus cases and evidence was taken on the hearing. The District Court reached the conclusion that they had been deprived of constitutional rights as alleged but that, as the trial court had jurisdiction and the judge was not prejudiced nor swayed by any improper influence, the judgment was not void and the errors and irregularities com-

plained of could be corrected only on appeal (R. 8, *Bridwell* v. *Aderhold,* 13 F. Supp. 253). No appeal was taken from these judgments. However, in December 1936 the applications for release on habeas corpus were renewed on the same grounds (R. 4–9). The District Court again appointed competent counsel to represent appellants on the second trial before him and they were represented by competent counsel on this appeal.

"There is some conflict in the evidence appearing in the record but the following facts may be considered as proved with reasonable certainty. When appellants were brought into the District Court in South Carolina the indictment was read to them and they signed pleas of not guilty. They were asked by the judge if they were represented by counsel and replied 'no' (R. 5, 21, 27–29, 41, 45, 48–49) and were then asked by him if they were ready for trial and replied 'yes' (R. 22, 24, 27–28, 30, 42). They did not request the judge to appoint counsel for them, he did not do so of his own motion and they were not represented by counsel at the trial.

"Appellants are white men and were both in the service of the United States in the Marine Corps. Bridwell had had eleven years continuous service and was a corporal (R. 46, 48). The term of service of Johnson is not shown. Bridwell had attended a country school until he was 15 years of age. Johnson had had fifth grade eduction (R.

48). During the trial Bridwell assumed charge of the defense for both appellants, cross examined government witnesses, took the stand in his own defense, and at the close of the case addressed the jury (R. 22, 25, 33, 46, 47). Johnson did not testify. There was evidence tending to show that Bridwell conducted the defense very well for a layman and showed some familiarity with legal procedure (R. 22, 25, 26, 33). During the trial Bridwell stated that he did not think that men of such limited knowledge as appellants would know counterfeit money when they saw it and asked that a witness be called to establish whether the money was counterfeit. The District Attorney procured a witness, who was a deputy sheriff in charge of tax collections and handled considerable money in performing his duties. He testified that the money was counterfeit and that that fact was readily discernible (R. 6, 34, 46–47). Bridwell had objected to the testimony of other witnesses but no objection was made to the introduction of this witness nor to his testimony.

"Bridwell testified the attorney who represented them before the commissioner continued to represent them until some time in January, and was paid $100 for his services; that he released them because they would not follow his advice to plead guilty, and they had no more money to pay him; that before the trial they made efforts to secure another lawyer, naming him, but were unable to get in touch

with him because they were in jail (R. 41, 43–44, 48).[1] Bridwell also testified, and this was corroborated by Johnson, that, in the presence of the judge, he asked the United States Attorney if he could be represented by counsel, and was told by him that in South Carolina counsel was not appointed by the court except in capital cases (R. 41, 45).[2] He then asked if he could have witnesses subpoenaed, and he was told by the United States Attorney that it was too late (R. 46). The United States Attorney, his assistant, and the clerk of the court, who were present at the time, denied that Bridwell made inquiry as to securing either counsel or witnesses, and denied that the United States Attorney made the statements attributed to him (R. 21, 23, 24, 26, 28, 33, 34, 39). Appellants further testified they did not know and were not advised of their right to ask for a new trial or take an appeal until after they had been removed to the penitentiary, when they

[1] The testimony of the petitioner and Bridwell at the pages in the record referred to indicate that they employed counsel the day after their arrest, that he consulted with them in jail several times after the Commissioner's hearing and advised them that their only chance was to plead guilty, that they several times requested him in writing to release them from their contract of employment, and that he withdrew from the case on January 14, 1935.

[2] The testimony referred to was given by Bridwell. Johnson merely testified that the District Attorney replied that they did not appoint counsel in South Carolina (R. 49). Bridwell further testified that he asked the Clerk if they could have counsel (R. 41). This is not corroborated by Johnson (R. 49).

were told by a fellow prisoner.[3] With his assistance they prepared an application for appeal (R. 7–13), but the trial judge declined to allow it, on the ground that it came too late and he was without jurisdiction (R. 30). There is no doubt that the time for an appeal had elapsed under the criminal appeals rules."

In addition to the facts thus recited by the court below it may be pointed out that the District Court discharged the writ of habeas corpus which is the subject of this appeal and remanded the prisoners to custody (R. 56–57). Both petitioner and Bridwell appealed to the Circuit Court of Appeals for

[3] As there is no testimony to this effect, what the court undoubtedly refers to is the allegations in the petition that petitioner "did not know that after his trial he had a right to move for a new trial or to appeal and was not at any time informed of these rights until many months after the trial" (R. 7). The Government, however, in its answer neither admitted nor denied this averment for want of sufficient information (R. 13). The testimony of the petitioner was to the effect that he made continuous effort after the trial to get a lawyer (R. 49). Bridwell also testified that they tried through their jailers and by a messenger boy to get a lawyer subsequent to the trial (R. 42, 44–45). The official who was in charge of the jail testified, however, that he made daily rounds of the jail and remembered seeing every prisoner, that he knew the petitioner and Bridwell, saw them frequently after their trial, and that no such request was made of him (R. 40). Although petitioner and Bridwell wrote a number of letters from the penitentiary commencing within a few days after their arrival there and including a letter to their former lawyer, no letter was written to seek a new trial or appeal until May 15, 1935, more than three months after their conviction (R. 29, 43, 50–52).

the Fifth Circuit. The appeals were consolidated and heard on the same record (R. 2–3, 65–66). On November 24, 1937, that court unanimously affirmed the judgment of the District Court (R. 65–70). Bridwell is not a party to the petition to this Court for certiorari (R. 52), having been released on parole (R. 52). On petitioner's present record of prison conduct and with the benefit of statutory good time credits (U. S. C., Title 18, Section 710), he will be released in July 1938 (R. 52).

SUMMARY OF ARGUMENT

Petitioner and his codefendant waived the right to counsel under the facts here presented. They had counsel from the day after arrest until they discharged him shortly before the trial, ~~when~~ not wishing to follow his advice to plead guilty. At the trial the judge asked them if they had counsel, to which they replied in the negative. He then asked them if they were ready for trial, to which they replied in the affirmative. Thereafter, the codefendant acted as counsel for both.

The Sixth Amendment imposes no duty on the trial court to proffer the services of counsel when the accused indicate no desire for assignment of counsel in ordinary circumstances in non-capital cases. Pertinent language in all the Federal cases that mention the right to counsel point to this conclusion, and it is the law in all of the twenty-two States which have ruled on the question under their constitutions.

Even if error was committed, it did not deprive the court of jurisdiction and render the judgment and sentence a nullity, so as to subject it to collateral attack on habeas corpus.

ARGUMENT

I

THE RIGHT TO COUNSEL WAS NOT DENIED UNDER THE FACTS OF THE INSTANT CASE

The petitioner contends that the failure of the court to assign counsel for him at his trial for possessing and uttering counterfeit money deprived him of his constitutional rights under the Fifth and Sixth Amendments, and that it therefore followed that his conviction was a nullity and he was entitled to be released on habeas corpus. Since it is not contended that the due process clause has been violated except in so far as it involves the right to counsel, and since such right is specifically pledged by the Sixth Amendment, it would avail nothing to discuss separately this right under the Fifth and Sixth Amendments.

A. *The circumstances in this case constituted a waiver of the right to the assistance of counsel*

The Sixth Amendment provides that: "the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

Clearly the constitutional right to counsel is one which an accused may exercise or fail to exercise at his discretion. It is a personal privilege and

may be waived. The Court has made the point clear in *Schick* v. *United States,* 195 U. S. 65, 72:

> Can it be that if he does not wish the assistance of counsel and waives it, the trial is invalid? It seems only necessary to ask these questions to answer them. When there is no constitutional or statutory mandate, and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy.

The *Schick case,* it is true, involved a petty offense, but in 1930 this Court, quoting its language as above set out, held that there is no distinction between the right to waive constitutional privileges in trials for petty offenses and the right to waive them in trials for felonies. *Patton* v. *United States,* 281 U. S. 276. Cf. *Reynolds* v. *United States,* 98 U. S. 145. Thus it is clear that rights guaranteed by the Fifth and Sixth Amendments may be waived, and waivers have been inferred from the action or inaction of the accused in the following cases: *Diaz* v. *United States,* 223 U. S. 442; *Powers* v. *United States,* 223 U. S. 303; *Trono* v. *United States,* 199 U. S. 521; *Fitzpatrick* v. *United States,* 178 U. S. 304; *Wilson* v. *United States,* 162 U. S. 613; *Brown* v. *Walker,* 161 U. S. 591; *Worthington* v. *United States,* 1 F. (2d) 154 (C. C. A. 7th); *Phillips* v. *United States,* 201 Fed. 259 (C. C. A. 8th). Cf. *Frank* v. *Mangum,* 237 U. S. 309; *Snyder* v. *Massachusetts,* 291 U. S. 97, 120–121.

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The highest courts of many states have held that the assistance of counsel is not essential to the validity of the trial, but is a privilege which may be waived. See Appendix A, *infra*, pp. 48–73.

The case of *Powell* v. *Alabama*, 287 U. S. 45, cannot be construed as holding that the right to counsel may not be waived. There this Court sent the case back to the state court for further trial, and held that in a capital case and in the peculiar circumstances of the case, failure to make an effective appointment of counsel was a violation of the due process clause of the Fourteenth Amendment. The decision is not authority for the proposition that a court must appoint counsel in all cases. Its authority extends only to capital cases under similar circumstances. See *Palko* v. *Connecticut*, 302 U. S. 319. Any contention that the case of *Powell* v. *Alabama* is applicable here disregards the following language employed by the Court therein to restrict its decision to the special and extraordinary circumstances there presented (pp. 71–72):

> In the light of the facts outlined in the forepart of this opinion—the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives—we think

the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process.

But passing that, and assuming their inability, even if opportunity had been given, to employ counsel, as the trial court evidently did assume, we are of opinion that, under the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment. *Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine.*[4] All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; * * *. In a case such as this, whatever may be the rule in other cases, the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel. * * *

The duty of the trial court to appoint counsel under such circumstances is clear, as it is clear under circumstances such as are disclosed by the record here; * * *.

[4]All italics are added, unless otherwise indicated.

In contrast with each of the circumstances emphasized by the Court in *Powell* v. *Alabama* as its reasons for holding that effective assistance of counsel was a necessary element of due process in that case, the evidence in the case at bar points to opposite circumstances. (1) The offense of which petitioner and his codefendant were tried and convicted was not a capital offense. (2) The court room was free from any hostile element. On the contrary, the record demonstrates that the officials in charge of the trial were meticulous in protecting the interests of the prisoners. As the District Court stated in denying the first petition for habeas corpus (13 F. Supp. 253, 256):

> There is no evidence or claim that the judge was hostile or prejudiced or swayed by any improper influence, such as that of a mob or of a dominating hostile public opinion, but, on the other hand, it clearly appears that he did not know either of the defendants, that he did not proceed with the trial until after both petitioners had announced that they were ready for trial, and that he did not conduct their case differently from other cases of like kind.

(3) There was no evidence before the trial court that petitioner and his codefendant were unable to employ counsel. On the contrary, they did employ counsel who represented them at the Commissioner's examination and consulted with them in jail a number of times thereafter up to approximately a

week before the trial. These facts make it apparent that they were well aware of their right to counsel and refute any claim of prejudice to their rights in not being informed of such right to counsel. (4) The evidence indicates and the courts below found in effect (R. 67, 69) that they were capable of making their own defense. On behalf of both, petitioner's codefendant cross examined prosecution witnesses and the defendants were furnished a witness at their request. One of them took the stand, and Bridwell, the codefendant, addressed the jury in summation. There is no evidence in the record and no claim in the petition for habeas corpus that professional counsel could have procured any witnesses or taken any steps which would have availed petitioner any advantage he did not have. There is no evidence from which a presumption can be raised that professional counsel would have made a motion for a new trial or appealed the conviction in the case.

Differences in the facts were held in *Shores* v. *United States,* 80 F. (2d) 942 (C. C. A. 9th), certiorari denied, 297 U. S. 705, to render the rule of *Powell* v. *Alabama* inapplicable. There the trial court ordered the trial to proceed, appointing the attorney of one of the codefendants to serve the defendant, although the defendant had requested a continuance on the ground that his counsel was incapacitated. The defendant was convicted of mail fraud and the Circuit Court of Appeals, by

a divided court, held that the absence of his own counsel was not reversible error. The opinion, citing at length the circumstances in the *Powell* case, makes the following distinctions, among others, similar to those in the case at bar (p. 946):

> * * * First, the appellant was not ignorant or illiterate * * * Second, there were no circumstances of public hostility * * * Fifth, he was not in deadly peril of his life. The case was not a capital one. Sixth, according to his own affidavit, appellant was able to employ an attorney who had represented him for at least two years. Seventh, * * * During this period we may assume from the appellant's affidavit as to such employment that he had been advised by counsel not only as to his rights in the premises, but also as to the defense he intended to interpose upon the trial and as to the witnesses it would be necessary to present that defense * * *.

Similarly, where a state judge had declined to assign counsel at the defendant's request, and defendant was tried without counsel, a United States District Court said, after reviewing the facts of the *Powell* case (*Wilson* v. *Lanagan*, 19 F. Supp. 870, 873 (Mass.)):

> None of these facts are present in the case at bar except that Wilson's mother was in California, although his wife was with him in the jail on the Saturday before his trial

and in the court at time of trial. This single instance of similarity is not enough to warrant this court, on the facts of this case, in adopting the conclusions of the court in the Powell case.

An examination of the State decisions discussing *Powell* v. *Alabama* reveals that the rule of that decision has been limited to capital cases involving circumstances analogous to those presented in that case. Thus, even in capital cases, *Powell* v. *Alabama* has been distinguished on its facts [5] more fre-

[5] *People* v. *Francis*, 356 Ill. 74. In this case as in the *Powell* case the defendants were negroes, illiterate, and charged with capital crime. But the court emphasized (at p. 79) that "The *Powell* case was tried amidst tense conditions, with State militia protecting the accused, while the trial of the defendant [here] was apparently free from any disturbing or prejudicial influence." *State* v. *Breeding*, 220 Iowa 605: Here counsel was appointed immediately before the defendant entered a plea of guilty to a murder charge on which he was sentenced to the death penalty. The sentence was affirmed, with dissent based on the *Powell* case. *State* v. *Whitfield*, 206 N. C. 696, certiorari denied, 293 U. S. 556: Counsel was appointed at the arraignment two days before trial. The defendant was convicted of rape and sentenced to death in a one-day proceeding. The *Powell* case was distinguished and the conviction affirmed. *Brown* v. *State*, 173 Miss. 542, 563, reversed on other grounds, 297 U. S. 278: Counsel was appointed the afternoon before trial and was given no access to the prisoner until the time of trial. The conviction was affirmed by the state supreme court, with vigorous dissents based on the *Powell* case. See also *Commonwealth* v. *Millen*, 289 Mass. 441, certiorari denied, 295 U. S. 765.

quently than it has been found applicable.[6] In non-capital cases *Powell* v. *Alabama* has been distinguished by state courts.[7]

Since it is evident that *Powell* v. *Alabama* is inapplicable here, the general rule that the privilege of counsel may be waived is applicable. The Government believes that the facts gleaned from a consideration of the whole record establish such a waiver.

The undisputed facts indicating a waiver are that petitioner and Bridwell had counsel at the Commissioner's hearing and until approximately one week before trial; that they declined to follow his advice to plead guilty; that they discharged him from the case; that they appeared without counsel; that the court read to them the indictment, to which

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[6] *Fugate* v. *Commonwealth*, 254 Ky. 663 (appointment of counsel day before trial); *Busby* v. *State*, 177 Miss. 68 (appointment two days before trial). See also *Dumas* v. *State*, 54 Okla. Cr. Rep. 207.

[7] *House* v. *State*, 177 So. 705, 707 (Fla. 1937); *State* v. *Van Vlack*, 65 P. (2d) 736, 746 (Idaho, 1937); *Commonwealth* v. *Mangan*, 200 N. E. 911 (Mass. 1936); *Prescott* v. *State*, 56 Okla. Cr. Rep. 259; *State* v. *Fairclough*, 86 Utah 326; *Tucker* v. *Commonwealth*, 159 Va. 1038; *State* v. *Bradley*, 175 Wash. 481. In *Commonwealth* v. *Richards*, 111 Pa. Sup. 124 (cited in petitioner's brief, p. 14), the court cited *Powell* v. *Alabama* in reversing a conviction of a defendant in a non-capital case who went to trial unrepresented because the counsel he had employed was not informed of the trial and the judge failed to appoint one. But it is to be observed that the rule in Pennsylvania was the same before the decision of this Court in the *Powell* case. See discussion *infra*, p. 67–68.

they entered a plea of not guilty; that the court asked them if they had counsel, to which they replied in the negative; that the court then asked them if they were ready to proceed to trial, to which they replied they were; that thereafter Bridwell, acting for himself and petitioner, conducted the defense, objected to and cross-examined the Government's witnesses, suggested the need of an expert witness, who was called and testified, took the stand on defense, and addressed the jury; and that no step was taken toward an appeal for some months.

Even from their own testimony it is clear that petitioner and Bridwell well understood their rights and it would have been superfluous to inform them of their right to counsel. They employed an attorney for nearly two months after their arrest, and this fact was known to officials in court (R. 24, 32). It may be assumed, as said in *Shores* v. *United States,* 80 F. (2d) 942, 946, *supra,* "* * * that he had been advised by counsel not only as to his rights in the premises, but also as to the defense he intended to interpose upon the trial and as to the witnesses it would be necessary to present that defense * * *." They discharged their counsel after declining to take his advice to plead guilty. There is nothing in the record to show that such advice was not sound. So far as any allegation, argument, or testimony in these proceedings indicates, the situation was simply that two marines in possession of $500 of spurious currency and

charged with uttering $80 of it with no evidence to offer in contradiction or explanation of such possession and uttering desired to exercise their right to be tried, but there is nothing to indicate that an experienced lawyer would not have viewed such a trial as futile. As was said in *Dietz* v. *State,* 149 Wis. 462, 480:

> It does not seem at all within the range of possibilities that any attorney could have made the facts of this case which point towards the defendant's guilt appear any less convincing. Were it a case where the evidence was scanty and the conclusions doubtful, a different question might possibly be presented.

The inference must be that they decided to go to trial without counsel. After announcing they had no counsel and were ready for trial, an able and alert defense was made. Of Bridwell's speech to the jury, brief though it was, it may well be said, as it was in the *Dietz* case, *supra,* at p. 479:

> An argument of this nature by a man whose liberty is hanging in the balance may well appeal to an American jury with greater force than the argument of a skilful lawyer.

When the verdict was returned, it was received without objection or inquiry as to the probability of an appeal (R. 21-22). No claim has ever been made that there was any ground of defense that could have been better prepared and presented by counsel, that any witnesses existed who could have helped

the defense, that there was any ground for a new trial or appeal, or that any evidence was negligently omitted which might have been produced. It must be concluded that petitioner and Bridwell advisedly and intelligently chose to dispense with counsel and to present what they had in the nature of defense without counsel.

The petitioner's argument that an express waiver was required is based on the fact that in *Patton* v. *United States,* 281 U. S. 276, the petitioner had expressly waived a full jury of twelve. Petitioner's contention confuses the function of a jury in the judicial process with the personal privilege of the assistance of counsel.

That there is a marked distinction between the requisites of waiver of a jury trial and those of the waiver of privileges granted solely for the benefit of the accused is clear from a review of the decisions of this Court and other Federal courts. In the *Patton* case, *supra,* at p. 312, it was said that the part played by a jury in the judicial process is of such importance that not only must the defendant expressly waive it but that the court and Government must join. In contrast, privileges granted solely for the benefit of the defendant are not of the same integral importance to the judicial process—are not similar integral elements thereof—and may be waived by acts of commission or omission which raise an inference of waiver. Thus, failure to demand a speedy trial waives the

right. *Worthington* v. *United States,* 1 F. (2d) 154 (C. C. A. 7th); *Phillips* v. *United States* 201 Fed. 259 (C. C. A. 8th). The right of an accused against self-incrimination is waived by his taking the stand as a witness, though he is without counsel and is not advised of his right by the court. *Powers* v. *United States,* 223 U. S. 303; *Fitzpatrick* v. *United States,* 178 U. S. 304; *Wilson* v. *United States,* 162 U. S. 613; *Brown* v. *Walker* 161 U. S. 591. The right not to be placed in double jeopardy is waived by appealing from the judgment of conviction. *Trono* v. *United States,* 199 U. S. 521. The right of an accused to be confronted with the witnesses against him is waived by his voluntarily absenting himself from the courtroom. *Diaz* v. *United States,* 223 U. S. 442. It is not a denial of due process to hold that the privilege of being personally present at the verdict is waived by failure of counsel to state such absence as a ground for new trial. *Frank* v. *Mangum* 237 U. S. 309.

It was testified by petitioner and Bridwell at the hearing on the application for habeas corpus that they requested counsel in court before the trial and were told by the United States Attorney that counsel was not appointed in such cases in South Carolina. It was further testified that after the trial a request for counsel was made by the prisoners in the jail. This testimony is refuted as to the demand in court by the United States Attorney, the Assistant United States Attorney and by the clerk of the court in which the trial was had, and as to

the demand in jail by the jailer. It is fundamental, of course, that a prisoner seeking relief by habeas corpus is required to allege and prove the facts establishing the illegality of his detention. By virtue of this rule, when taken in connection with the presumption attending the validity of the judgment and sentence, it follows that in the instant case much more was required than the testimony of the interested codefendants to overcome the testimony given by the Government officials, who were officers of the court, that the codefendants had not made a request for counsel. See *Holden* v. *Minnesota,* 137 U. S. 483, 491–492. This is all the more true as the testimony of the Government officials on all other features of the trial coincides with that of the codefendants. Thus the Court is not required to accept the testimony of the codefendants as true, and it must be taken as established that no request for counsel was made.

Every court which has ruled on situations corresponding to that presented in the instant case has held that such facts constitute a waiver of the constitutional right to counsel.[8] *Wilson* v. *Lanagan,*

[8] For cases which, while not expressly holding such facts to constitute a waiver, hold that no duty lies on the trial court to proffer counsel in the absence of a request, see the rules in Alabama, *infra*, p. 48; Illinois, *infra*, p. 53; Iowa, *infra*, p. 55; Kansas, *infra*, p. 56; Massachusetts, *infra*, p. 60; Michigan, *infra*, p. 61; Mississippi, *infra*, p. 62; Montana, *infra*, p. 64; Nevada, *infra*, p. 65; South Carolina, *infra*, p. 68; Texas, *infra*, p. 68; Virginia, *infra*, p. 71; Utah, *infra*, p. 70.

19 F. Supp. 870 (Mass.); *Perkins* v. *Sheriff*, 23 F. (2d) 892 (La.); *Weatherford* v. *State*, 76 Fla. 219; *Gatlin* v. *State*, 17 Ga. App. 406; *Marovich* v. *State*, 202 Ind. 274; *Grogan* v. *Commonwealth*, 222 Ky. 484; *Holland* v. *Commonwealth*, 241 Ky. 813; *State* v. *Kelly*, 25 La. Ann. 381; *State* v. *Terry*, 201 Mo. 697; *State* v. *Raney*, 63 N. J. Law 363; *State* v. *Yoes*, 67 W. Va. 546; *State* v. *Kellison*, 56 W. Va. 690; *James* v. *State*, 27 Wyo. 378; *United States* v. *Go-Leng*, 21 Phil. Rep. 426.

In summary we submit that the constitutional right to the assistance of counsel may be waived, that such waiver may be implied from the circumstances of the case, and that the facts in this case did so constitute a waiver.

B. The Sixth Amendment imposes no duty on a trial court to appoint counsel of its own motion in the absence of a request.

If all the other circumstances indicating a waiver of the right to counsel are ignored, petitioner's failure to request counsel and his announcement of readiness for trial without counsel suffice to refute the contention that the right to counsel was denied.

A trial court is not required by the Sixth Amendment to appoint counsel of its own motion, in the absence of a request and showing of inability to employ counsel, in a non-capital felony case under routine circumstances when defendants in response to the court's questions state that they have no counsel and are ready to proceed to trial.

The Sixth Amendment was not intended to impose any such duty on the trial judge. Its purpose was to preserve in the Federal system the right of accused persons to defend in person or by counsel which had been previously guaranteed by the colonies in derogation of the English common law. *Powell* v. *Alabama*, 287 U. S. 45, 60–65; 1 Cooley's *Constitutional Limitations*, 8th ed., 698 et seq.; and see *Patton* v. *United States*, 281 U. S. 276, 307. Directed against the injustice of the common law denial of such right, the purpose of the provision could hardly be construed to impose on the trial judge the obligation of taking affirmative action to insure that a defendant had counsel.

The first ten Amendments to the Constitution were proposed by Congress in September 1789 (1 Stat. 97).[9] A few months later, and while the Sixth Amendment was before the States for ratification, the Act of April 30, 1790,[10] was passed, providing that a person accused of treason or other capital offense should be allowed to defend by counsel and that the court should "* * * immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire." The enactment of this

[9] The debates on the proposal which became the Sixth Amendment disclose nothing relevant to the present question. 1 Debates in Cong. (O. S.) 784–785.

[10] 1 Stat. 112, 118, c. 9, Sec. 29 (U. S. C., Title 18, Sec. 563; R. S. 1034). No debate on the bill is reported. 1 Debates in Cong. (O. S.) 976–977, 1141; 2 Debates in Cong. (O. S.) 1572–1574.

statute during the pendency of the ratification of the Sixth Amendment indicates that Congress did not understand the Amendment to require trial courts to undertake to assign counsel in any case even on request, else the statute would have been superfluous.

This statute unamended remains the only enactment on the subject. It confines to capital cases the duty of the trial judge to assign counsel to a defendant, and then only "upon his request." The manifest import of the statute is that in non-capital cases no duty of assignment is imposed.

However, though denying that it was intended by the constitution or statute to impose any duty of assignment in non-capital cases, the Government recognizes that the practice has become established on the part of bench and bar to see that those defendants shall not go unrepresented who, being indigent and not electing to defend in person, make a timely request and showing for assignment of counsel.[11] 1 Cooley's *Constitutional Limitations,* 8th ed., 700. Moreover, the Government concedes that the better practice is to assign counsel

[11] Counsel is not entitled to compensation from the Government for services rendered on assignment by a federal court. *Nabb* v. *Lawless's Case,* 1 Ct. Cl. 173. The rule is the same in nearly all the states. See cases collected in 36 L. R. A. (N. S.) 377. Bills to provide defenders at government expense in the District of Columbia and federal district courts were introduced at the last session of Congress but were never reported out by the Judiciary Committees, H. R. 3154, H. R. 3155, S. 2027, S. 2028, 75th Cong., 1st Sess.

in the absence of an express waiver.[12] But that such practice, salutary and wise as it may be, is required by the Sixth Amendment certainly does not follow, for, as this Court has said, "Not all the precepts of conduct precious to the hearts of many of us are immutable principles of justice, acknowledged *semper ubique et ab omnibus* (*Otis* v. *Parker,* 187 U. S. 606, 609), wherever the good life is a subject of concern." *Snyder* v. *Massachusetts,* 291 U. S. 97, 122.

Not only is no express duty to assign counsel in the absence of a request imposed by the Constitution or by statute, but no such requirement is found in the decisions. The only statement that it is the duty of the court, whether requested or not, to assign counsel is found in *Powell* v. *Alabama, supra,* 287 U. S. at 71, a decision meticulously limited to its facts. We believe none of the decisions of this Court, of the lower federal courts, or of the state appellate courts have construed that decision as requiring an assignment in routine circumstances in the absence of a request.

In *Wilson* v. *Lanagan,* 19 F. Supp. 870 (Mass.), *supra,* p. 23, which arose on habeas corpus, it appeared (p. 871) that the petitioner Wilson had requested a State trial court to assign counsel for him. The justice replied that since it

[12] See Department of Justice Circular No. 2946, set out in Appendix II, *infra,* p. 74, issued after the present proceeding was instituted and designed to prevent a recurrence of the situation.

was not a capital case he had no authority to do so, but he offered to instruct the sheriff to communicate with any available attorney whom Wilson might name. Wilson then asked for a continuance in order that he might communicate with his mother, who was in California. After inquiries, made of Wilson and the sheriff, the trial justice concluded that Wilson had not been deprived of an opportunity to get counsel, if he had wanted to do so, and refused his request for further continuance. Wilson then conducted his own trial. The District Court found nothing to indicate the trial was not conducted in an orderly and proper manner and with due regard for the rights of the accused, and denied habeas corpus, saying (p. 873):

> *Powell* v. *Alamaba*, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527, is authority for the proposition that due process not only includes the right to be represented by counsel employed by defendant, but adequate time for preparation of his defense; and in capital cases it includes the duty to assign counsel if defendant is not otherwise represented. It will be noted, however, that the duty to assign was expressly limited to capital cases.

In *Shores* v. *United States*, 80 F. (2d) 942, 945 (C. C. A. 9th), *supra*, p. 15, the court said:

> We have only to consider the facts in *Powell* v. *State of Alabama* to disclose the

contrast between the situations presented in the two cases.

In addition to these cases distinguishing *Powell* v. *Alabama* on its facts, no language is found in the federal cases extending the rule there enunciated to a requirement that the court assign counsel of its own motion in all cases. Cf. *Snyder* v. *Massachusetts*, 291 U. S. 97, 128; *Grosjean* v. *American Press Co.*, 297 U. S. 233, 243; *Brown* v. *Mississippi*, 297 U. S. 278, 286; *Palko* v. *Connecticut*, 302 U. S. 319; *Roberts* v. *Anderson*, 66 F. (2d) 874, 876 (C. C. A. 10th) *Thomas* v. *District of Columbia*, 90 F. (2d) 424, 428 (App. D. C.); *Downer* v. *Dunaway*, 1 F. Supp. 1001, 1002–1003 (Ga.); *Louie Yung* v. *Coleman*, 5 F. Supp. 702, 703 (Idaho); *In Re Ades*, 6 F. Supp. 467, 476 (Md.).

Of *Powell* v. *Alabama*, the Court said in *Palko* v. *Connecticut*, *supra*, "The decision turned upon the fact that in the particular situation laid before us in the evidence the benefit of counsel was essential to the substance of a hearing." In *Roberts* v. *Anderson*, *supra*, the court said, citing *Powell* v. *Alabama*, "The right to a hearing includes the right to the assistance of counsel of his own choice, *if requested.*" *Downer* v. *Dunaway*, *supra*, followed the *Powell* case because of similar circumstances of mob dominance.

In *In Re Ades*, *supra*, the court said, "It was held in *Powell* v. *Alabama* * * * that the right of the accused at least in a capital case to have the aid of counsel for his defense is one of the funda-

mental rights guaranteed by the due process clause of the Fourteenth Amendment, and that *in such a case, where the defendant is unable to employ counsel,* it is the duty of the court, whether requested or not, to assign counsel for him * * *."

Not only is it apparent therefore that there is nothing in *Powell* v. *Alabama* or the decisions following it which supports the contention that in routine cases the Constitution requires an assignment of counsel without a request, but it may be pointed out that examination of earlier decisions of this Court fails to reveal the suggestion of such rule. In *Cooke* v. *United States,* 267 U. S. 517 (cited in *Powell* v. *Alabama*), this Court said of a hearing in a federal court on a charge of contempt committed outside the presence of the court (p. 537): "We think this includes the assistance of counsel, *if requested.*" In *Andersen* v. *Treat,* 172 U. S. 24, habeas corpus was denied a person convicted of murder in a federal court, despite the circumstances that his attorney was not permitted to see him in jail; that the accused made a self-incriminating statement at the Commissioner's hearing without advice of counsel; and that the accused was not permitted to have his own counsel and was represented at the trial by an attorney appointed by the court. In *In Re Jugiro,* 140 U. S. 291, this Court denied habeas corpus to a person convicted of murder and sentenced to death by a New York court. The accused had requested coun-

sel and the court assigned counsel who was not admitted to practice and who failed to take the exceptions necessary to appeal from the judgment of conviction. Cf. *Ashe* v. *United States,* 270 U. S. 424. In *Patton* v. *United States,* 281 U. S. 276, 308, the court quotes with approval language from *Hack* v. *State,* 141 Wis. 346, to the effect that failure to ask for a privilege constitutes a waiver of it.

The decisions in the lower federal courts prior to the *Powell* case point in the same direction. In *Perkins* v. *Sheriff,* 23 F. (2d) 892 (La.), habeas corpus was sought on the ground that the state trial court did not appoint counsel, no request having been made, and imposed sentence without affording an opportunity for a motion for new trial. The writ was denied.

In *Urban* v. *United States,* 46 F. (2d) 291 (C. C. A. 10th), the court held that the federal trial court committed no prejudicial error by empaneling a jury in the absence of the defendant's counsel. See to same effect *Paoni* v. *United States,* 281 Fed. 801 (C. C. A. 3rd). In *Hagan* v. *United States,* 9 F. (2d) 562 (C. C. A. 8th), it was held that a physician's affidavit alleging insanity of counsel representing the defendant at the trial did not constitute sufficient evidence to afford ground for reversal. In *United States* v. *Rosenstein,* 34 F. (2d) 630 (C. C. A. 2d), the court held that denial of a continuance to enable new counsel to acquaint himself with the case was not an abuse of the trial court's dis-

cretion. In *Crouch* v. *United States,* 298 Fed. 437 (C. C. A. 6th), it was held that denial of a continuance on the ground that the defendant's counsel was engaged in trial elsewhere and that defendant was represented only by counsel appointed by the court at the trial was not reversible error. The court said (p. 440): "The result would not rightly have been different, had counsel originally retained conducted the defense." In *Henry Ching* v. *United States,* 264 Fed. 639 (C. C. A. 9th), certiorari denied, 254 U. S. 630, the defendant stated he wanted to discharge his counsel and asked for a few days to get another, and counsel asked to be excused, but the court appointed him in spite of this, and it was held not to constitute prejudicial error.

Nothing in the cases of *Dillingham* v. *United States,* 76 F. (2d) 36 (C. C. A. 5th); *Downer* v. *Dunaway,* 53 F. (2d) 586 (C. C. A. 5th), or *Ex Parte Riggins,* 134 Fed. 404 (Ala.) is contrary to the conclusion herein reached. In the *Dillingham* case, the judgment of the District Court was reversed on the insufficiency of the evidence and on what the appellate court described as a "complete abandonment of all trial safeguards" and a "denial of all constitutional rights." In *Downer* v. *Dunaway,* the granting of habeas corpus was directed by a divided Circuit Court of Appeals in a situation similar to and fully as aggravated as that presented in *Powell* v. *Alabama.* In the *Riggins* case, the court merely stated, by way of illustration, that it

would not be due process for a state to "deprive a person of the benefit of counsel" (p. 418).

Hearings in which aliens seeking admission to this country were not informed of their right to the aid of counsel have been held to constitute fair hearings by this and other courts. *Quon Quon Poy* v. *Johnson,* 273 U. S. 352; *Ex Parte Ching Hing,* 224 Fed. 261 (Wash.); *Buccino* v. *Williams,* 190 Fed. 897 (N. Y.). In *Ex Parte Chin Loy You,* 223 Fed. 833 (Mass.) (cited in *Powell* v. *Alabama*) it was held that in a deportation proceeding a "request for counsel seasonably made" should be granted. See also to the same effect *Ex Parte Iwata,* 219 Fed. 610 (Calif.).

Thus, it is seen that nothing in the federal cases, either after or before *Powell* v. *Alabama,* imposes on the trial judge the duty of assigning counsel in the absence of a request.

Since there is no federal decision on the exact question of whether the Sixth Amendment requires an assignment of counsel in the absence of a request, we believe that the construction on the question under the state constitutions by the state courts assumes particular importance. All the states guarantee to accused persons by their constitutions the right to defend themselves in person or by counsel. These state constitutional guarantees are similar to the Sixth Amendment. The appellate courts of 22 states have ruled on the question whether a trial court must assign counsel even

though no request is made. They have uniformly held that no such duty is imposed on the trial court. In a few states it has been held that there is no duty at all to assign counsel even on request, and denial of the request for an assignment has been held not to constitute reversible error. Some state jurisdictions require considerably more than a request, such as a showing of inability to employ counsel, even in capital cases. The survey of State law which is summarized here and set out in full as Appendix A, *infra,* pp. 48–73, shows a remarkable clearness and uniformity of decision upon the necessity of a request before the trial court must appoint counsel.

Typical and representative of the language of the decisions in the state courts on factual circumstances similar to those presented here are the following excerpts. In *People* v. *Lavendowski,* 326 Ill. 173, 176, it was said:

> The constitutional provision * * * does not place upon the court the duty to proffer the services of counsel.

And in *Holland* v. *Commonwealth,* 241 Ky. 813, 817:

> Although it is true that the Constitution guarantees to the accused in all criminal prosecutions the right to be heard by himself and counsel, it is not the duty of the court to assign counsel to the accused unless he requests it, and shows that he is financially unable to employ counsel, or lacks sufficient

> mental capacity to conduct the defense, or to understand its nature.

And in *Gatlin* v. *State,* 17 Ga. App. 406, 408:

> Where the defendant, as in this case, in answer to a query from the court, states that he has no counsel, and in answer to another question from the court replies that he is ready for trial, and makes no request for counsel to be appointed to defend him, but, on the contrary, actively enters into the case as his own lawyer, agreeing upon a jury, cross-examining the witnesses, and making his own statement to the jury, he waives his right to be represented by counsel.

In *Weatherford* v. *State,* 76 Fla. 219, 223, it was said:

> * * * the mere failure of the trial judge to ask the accused if he desired counsel or was unable to employ counsel to represent him in the case, or to inform him that he had a right to be represented by counsel, or that the court would appoint counsel to represent him if he so desired, does not show a deprivation of any right secured to the accused by law; * * *

State v. *Raney,* 63 N. J. Law 363, 365, uses this language:

> The right and privilege is not denied by mere failure to assign counsel.

As said in *State* v. *Yoes,* 67 W. Va. 546, 547:

> The right to have counsel is a mere privilege guaranteed by the constitution. * * *

> No invasion of this guaranty is disclosed, therefore, unless a request for the assistance of counsel appears by the record to have been denied by the court.

As said in *James* v. *State,* 27 Wyo. 378, 384:

> The right, or privilege, to defend by counsel, * * * may be waived or renounced, and it is not denied by a mere failure to assign counsel. There is no invasion of it disclosed, unless it appear by the record that a request for the assignment of counsel was denied by the court.

As said in *State* v. *Steelman,* 318 Mo. 628, 631:

> * * * before appointing or assigning counsel for a defendant charged with a felony the trial court must find three things: first, that the defendant is without counsel; second, that he has requested the court to appoint counsel for him; and, third, that *he is unable to employ counsel.* [Italics in original.]

Thus we believe there is persuasive authority in the federal decisions and overwhelming authority in the decisions of the 22 states which have ruled clearly on the question to support our position that the rule is thoroughly well-established in this country that the right to the assistance of counsel is not denied an accused unless he satisfies the court of his indigence and makes a request for an assignment of counsel, and unless such request is denied by the court.

To hold that the Sixth Amendment requires an offer to assign counsel when a defendant, as in this case, appears without counsel and announces himself ready for trial, would involve a suggestion that the states have been uniformly mistaken in the construction of their own constitutions. The further question would arise whether the uniform practice as reflected by the reported decisions satisfies the requirements of due process. Petitioner's contention, if adopted, would confuse the practice in state courts of misdemeanor as well as felony jurisdiction.

If his contention were established as a rule of law, it would be difficult to deny its applicability to unrepresented defendants who announce their readiness to plead guilty to the charges against them. From this it would logically follow that confessions could not be heard by officers without their offering to procure counsel, or at least that such confessions would be inadmissible in evidence. These procedural changes, which logically would be required by the rule sought by the petitioner, are far afield from the scope of the judicial function.

II

IF ERROR WAS COMMITTED, IT DID NOT DIVEST THE TRIAL COURT OF JURISDICTION AND CANNOT BE REACHED BY HABEAS CORPUS

We submit that in any event the question sought to be raised by petitioner cannot be presented in a habeas corpus proceeding. We recognize that if it

be assumed that the constitutional rights of petitioner were denied, to confine him to a remedy by appeal might work hardship in the circumstances of this case, where the error complained of is the failure of the court to assign counsel. Nevertheless it is believed that the decisions of this Court establish the principle that the petitioner has no remedy by habeas corpus.

It is elementary that the writ of habeas corpus may only be employed when there is absence of jurisdiction and the power to sentence in the trial court. To render habeas corpus applicable, the defect must render the trial proceedings a nullity. As said by Mr. Chief Justice Marshall in *Ex Parte Watkins,* 3 Pet. 193, 202:

> An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity, if the court has general jurisdiction of the subject, although it should be erroneous.

It is equally well established that irregularities occurring in the trial proceedings cannot be reviewed on habeas corpus and that the writ cannot be made the substitute for an appeal. The defect which may be reached, by habeas corpus must render the trial and judgment void, not merely voidable. *Ex Parte Parks,* 93 U. S. 18; *Ex Parte Reed,* 100 U. S. 13; *Ex Parte Clarke,* 100 U. S. 399; *Ex Parte Harding,* 120 U. S. 782; *In Re Jugiro,* 140 U. S. 291; *Matter of Moran,* 203 U. S. 96; *Kaizo* v. *Henry,* 211 U. S. 146; *Harlan* v. *Mc-*

Gourin, 218 U. S. 442; *Collins* v. *Johnston,* 237 U. S. 502; *Frank* v. *Mangum,* 237 U. S. 309.

A constitutional violation in itself does not render the judgment and sentence void. In order for habeas corpus to be an appropriate remedy the circumstances must be such that the court proceeded to trial and judgment without jurisdiction.

In *Riddle* v. *Dyche,* 262 U. S. 333, the Court denied habeas corpus sought on the ground that petitioner's conviction in a federal court was by a jury of eleven men. The trial judge had refused to amend the record to show the fact that there were but eleven jurors and had refused an offer of proof. This Court had held, before the habeas corpus proceeding, that it could not compel the amendment of the record by mandamus, *Ex Parte Riddle,* 255 U. S. 450, and that the remedy was by writ of error, though the record did not show such error. It will be noted that habeas corpus was denied in this case before *Patton* v. *United States,* 281 U. S. 276, 293, had overruled the following language of *Thompson* v. *Utah,* 170 U. S. 343, 353, referring to the Constitution:

> The law in force, when this crime was committed, did not permit any tribunal to deprive him of his liberty, except one constituted of a court and a jury of twelve persons.

The *Patton* case itself points out that a constitutional privilege does not necessarily go to jurisdiction (p. 298):

> Upon this view of the constitutional provisions we conclude that Article III, Section 2, is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election. * * *.
>
> But the question remains whether the court is empowered to try the case without a jury; that is to say, whether Congress has vested jurisdiction to that end.

In *In Re Belt*, 159 U. S. 95, the Court held that habeas corpus would not issue to review the judgment of the lower court upholding the constitutionality of an Act permitting waiver of a jury in criminal cases in the District of Columbia since the lower court had jurisdiction.

In the case of *In Re Jugiro*, 140 U. S. 291, the appellant claimed that he had been deprived of his constitutional right of counsel in that the person assigned at his trial was not an attorney licensed to practice, and through the ignorance of such unlicensed attorney no exceptions were taken and his appeal had been dismissed (123 N. Y. 630), because of the absence of such exceptions in the record. Though no other relief was available, the Court held (140 U. S. at 296, 297):

> The alleged assignment, at the trial of appellant, of one as his counsel who (although he may have been an attorney at law) had not been admitted or qualified to practise as an attorney or counsellor at law in the courts of New York; * * * were all matters occurring in the course of the pro-

> ceedings and trial in a court of competent jurisdiction * * *. The errors, if any, committed by that court in respect to any of those matters, did not affect its jurisdiction of the offence or of the person accused, and cannot be reached by *habeas corpus.*

In *Anderson* v. *Treat,* 172 U. S. 24, the Court denied habeas corpus to a person convicted of murder in a federal court where his employed attorney was not permitted to consult with or represent him, where as a consequence he made a statement at the Commissioner's hearing without the advice of his retained counsel, and where at the trial he was represented by an assigned counsel not of his choosing. The Court had affirmed the conviction without that point being raised, apparently because it did not appear in the record. 170 U. S. 481. The Court denied habeas corpus, though no further appeal on the constitutional question remained.

In *Frank* v. *Mangum,* 237 U. S. 309, the petitioner's right to be personally present at the verdict had been waived by his counsel and the state court had held that counsel's failure to make such involuntary absence at the verdict a ground in the motion for new trial operated as a permanent waiver of the right. This Court denied habeas corpus though no method remained to obtain relief from such denial of a recognized right.

In *Ex Parte Harding,* 120 U. S. 782, the petition for habeas corpus alleged that the accused was denied the right of compulsory process for obtaining

witnesses under the Sixth Amendment. Of this the Court said (120 U. S. at 783–784):

> This court has no jurisdiction for the discharge on habeas corpus of a person imprisoned under the sentence of a territorial court in a criminal case, unless the sentence exceeds the jurisdiction of that court, or there is no authority to hold him under the sentence * * *. For such errors or irregularities, if they exist, a judgment is not void, and a writ of habeas corpus gives this court no authority for their correction.

In *Ex Parte Parks,* 93 U. S. 18, the petition for habeas corpus alleged that the petitioner was convicted in a federal court of an offense which he alleged was not a crime under the laws of the United States. This Court said (93 U. S. at 23):

> But if the court had jurisdiction and power to convict and sentence, the writ cannot issue to correct a mere error * * *.
>
> But, in the case before us, the District Court had plenary jurisdiction, both of the person, the place, the cause, and everything about it. To review the decision of that court by means of the writ of *habeas corpus* would be to convert that writ into a mere writ of error, and to assume an appellate power which has never been conferred upon this court.

Allegations in the petition for the writ of habeas corpus that petitioner's rights under the Fifth

Amendment had been infringed by a territorial court were involved in *Matter of Moran,* 203 U. S. 96. The Court, speaking through Mr. Justice Holmes, said (203 U. S. at 105):

> Finally it is contended that the petitioner was compelled to be a witness against himself, contrary to the Fifth Amendment, because he was compelled to stand up and walk before the jury, and because, during a recess, the jury was stationed so as to observe his size and walk. If this was an error, as to which we express no opinion, it did not go to the jurisdiction of the court.

In *Felts* v. *Murphy,* 201 U. S. 123, the Court denied habeas corpus though the petitioner was so deaf he had not heard a word of the trial proceedings and so poor he could not have taken an appeal.

Petitioner relies upon the cases of *Hans Nielsen, Petitioner,* 131 U. S. 176; *Moore* v. *Dempsey,* 261 U. S. 86; and *Mooney* v. *Holohan,* 294 U. S. 103.

None of these cases alters the rule limiting habeas corpus to judgments rendered without jurisdiction. All are cases in which constitutional rights were disregarded in such a way as to render the trial a nullity and to deprive the trial court of jurisdiction.

As to cases of the type of *Moore* v. *Dempsey,* it would seem almost sufficient to quote the language of Mr. Justice Holmes, speaking for the Court in reversing an order granting habeas corpus

in *Ashe* v. *United States,* 270 U. S. 424, 426:

> Extraordinary cases where there is only the form of a court under the domination of a mob, as was alleged to be the fact in *Moore* v. *Dempsey,* 261 U. S. 86, offer no analogy to this.

There is nothing in the normal judicial proceedings had in the trial court below which corresponds to the extraordinary facts presented in *Moore* v. *Dempsey,* described by this Court as follows (pp. 89–90):

> The Court and neighborhood were thronged with an adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result. The counsel did not venture to demand delay or a change of venue, to challenge a juryman or to ask for separate trials. He had had no preliminary consultation with the accused, called no witnesses for the defense although they could have been produced, and did not put the defendants on the stand. The trial lasted about three-quarters of an hour and in less than five minutes the jury brought in a verdict of guilty of murder in the first degree. According to the allegations and affidavits there never was a chance for the petitioners to be acquitted; no juryman could have voted for an acquittal and continued to live in Phillips County and if any prisoner by any chance had been acquitted by a jury he could not have escaped the mob.

Even allegations of mob domination and the presence of military forces have been held insufficient to invoke the authority of cases like *Moore* v. *Dempsey*. *Bard* v. *Chilton*, 20 F. (2d) 906 (C. C. A. 6th), certiorari denied, 275 U. S. 565; *Dunn* v. *Lyons*, 23 F. (2d) 14 (C. C. A. 5th), certiorari denied, 276 U. S. 622.

In *Hans Nielsen, Petitioner, supra,* the defendant was convicted and sentenced for unlawful cohabitation and later for the same acts was indicted for adultery, to which he entered a plea of double jeopardy. This Court, following its previous decision of *In Re Snow,* 120 U. S. 274, held that the first indictment covered the whole offense, and that the second indictment for the same offense, as it placed the defendant in double jeopardy, bestowed no jurisdiction on the court. In no way did the court in the *Nielsen* case depart from the established rule, as it said (131 U. S. at 185):

> * * * the writ only lies when the sentence exceeds the jurisdiction of the court, or there is no authority to hold the defendant under it. In the present case, the sentence given was beyond the jurisdiction of the court. * * *.

In *Mooney* v. *Holohan, supra,* the Court stated that the existence of the following facts would constitute denial of due process (294 U. S. at 112):

> * * * if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving

> a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.

A writ repeatedly limited to situations so extraordinary that a court loses jurisdiction surely is not available to set aside a judgment on a petition which, though skilfully prepared, fails to allege one instance of prejudice except that petitioner and his codefendant were permitted to defend in person, a right they certainly had. To hold with petitioner here would overrule the well-established rule that error, even though it effected grievous prejudice, even though it allegedly involved constitutional privileges and even though all other avenues of review were precluded by such error, is not reviewable on habeas corpus.

What was said by the Court in *Snyder* v. *Massachusetts,* 291 U. S. 97, 122, in connection with the Fourteenth Amendment is equally pertinent to the Sixth Amendment:

> There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to a local law, and set the guilty free.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the Circuit Court of Appeals should be affirmed.

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MARCH 1938.

APPENDIX A

Appendix A contains a survey of the decisions of State speaking on the subject are here listed: of the trial judge to assign counsel in the absence of a request.

For the convenience of the Court, the pages upon which are begun the discussions of law of each State speaking on the subject are here listed:

State:	Page	State:	Page
*Alabama	48	*New Jersey	65
Arkansas	50	New York	66
California	50	North Dakota	67
*Florida	51	Ohio	67
*Georgia	52	Oklahoma	67
*Illinois	53	Oregon	67
*Indiana	54	Pennsylvania	67
*Iowa	55	*South Carolina	68
*Kansas	56	South Dakota	68
*Kentucky	57	*Texas	68
*Louisiana	59	*Utah	70
*Massachusetts	60	Vermont	70
*Michigan	61	*Virginia	71
Minnesota	62	Washington	71
*Mississippi	62	*West Virginia	72
*Missouri	62	Wisconsin	72
*Montana	64	*Wyoming	73
Nebraska	65	*Philippine Islands	73
*Nevada	65		

The jurisdictions starred have held directly on the point.

No pertinent decisions are found in the states not listed.

Alabama.—The rule in Alabama is that no duty, constitutional or moral, lies with the trial court to appoint counsel for indigents except in capital cases, and it remains unaffected by *Powell* v. *Ala-*

bama. Green v. *State,* 170 So. 72 (Ala. App. 1936), certiorari denied, 233 Ala. 49; *Bethune* v. *State,* 26 Ala. App. 72, certiorari denied, 228 Ala. 422. It will be noted that both cases followed the decision of this Court in *Powell* v. *Alabama,* though they do not cite it. In *Green* v. *State,* the court said (p. 73):

> * * * the law makes no provision to furnish counsel to any person accused of crime unless charged with a capital offense, and is unable to employ counsel.

and in *Bethune* v. *State* it is said (p. 73):

> It is also insisted that the trial court erred in not appointing counsel for these two defendants because they were charged with a felony, were unlearned, and did not have money to employ a lawyer to represent them. There is no merit in this insistence. The court is under no legal duty to appoint counsel in any case unless the accused has been indicted for a capital offense and it is made known to the court he is unable to employ counsel.

Of the effect of *Powell* v. *Alabama,* the Court of Appeals later said (*Gilchrist* v. *State,* 173 So. 649, 650 (Ala. App. 1937)):

> And, in view of the discussion by Mr. Justice Sutherland, in the opinion on certiorari to the Supreme Court of Alabama, in the case of *Ozie Powell et al.* v. *State of Alabama,* 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527, we are persuaded that the wiser, at least safer, course, would be for the trial court to appoint counsel for defendants charged with felonies, who are unable to employ counsel, in all cases.
>
> * * * * *

> True, we cannot reverse the judgment of conviction because of the fact that appellant had not benefit of counsel on his trial. *Bethune et al.* v. *State, supra.*

Of this, the Supreme Court said, in denying certiorari, 173 So. 651:

> * * * we must not be understood as approving, or as giving our full assent to, all that is said by the Court of Appeals with reference to the appointment, by trial courts, of "counsel for defendants charged with felonies, who are unable to employ counsel, in all cases." No such duty rests upon trial courts. The statute only requires that such courts shall appoint counsel for a defendant who is indicted for a capital offense, and who is unable to employ counsel. Code, Sec. 5567; *Campbell* v. *State,* 182 Ala. 18, 62 So. 57. This has been the extent of the duty enjoined upon trial courts, with respect to appointment of attorneys for defendants, since the earliest history of the State. The rule has worked reasonably well, and we can see no good reason for advising a departure from it at this time. We are not impressed that the time has come when defendants charged with felonies, not capital, shall have attorneys ad litem appointed for them.

Arkansas.—In Arkansas, a trial court is required by statute to inquire if counsel is desired. *Ruloff* v. *State,* 142 Ark. 477. Of course, counsel may be waived. *Williams* v. *State,* 153 Ark. 289. (Cited by petitioner, Brief, p. 14.)

California.—In California, the trial court is required by statute to inquire of an indigent defendant if he wishes the court to appoint counsel.

People v. *Crowley,* 13 Cal. App. 322. In a case preceding such mandatory statute, the Supreme Court suggested that the duty to assign was only a moral duty. *People* v. *Goldenson,* 76 Cal. 328. The accused may waive the right. *People* v. *Northcott,* 209 Cal. 639; *People* v. *Mayfield,* 85 Cal. App. 77; *People* v. *Rose,* 42 Cal. App. 540. But the waiver need not be expressed and may be inferred. *People* v. *Cortze,* 108 Cal. App. 111. At preliminary examination, waiver is inferred from failure to request counsel. *People* v. *Crowley,* 13 Cal. App. 322; see also *People* v. *White,* 17 Cal. App. 486. And a court which refused a continuance sought on the ground that defendant's attorney was out of the State and offered to appoint an attorney, whom the defendant refused insisting on his right to his own attorney, was held not to have committed error. *People* v. *Russell,* 156 Cal. 450.

Florida.—In Florida, facts almost identical to those of the present case were presented to the Supreme Court. *Weatherford* v. *State,* 76 Fla. 219. The trial court asked if the defendant had counsel; on his reply in the negative the court asked if he was ready for trial, to which he replied he was. The Supreme Court said (p. 223):

> It does not appear that the assistance of counsel was "desired by" the accused; and the mere failure of the trial judge to ask the accused if he desired counsel or was unable to employ counsel to represent him in the case, or to inform him that he had a right to be represented by counsel, or that the court would appoint counsel to represent him if he so desired, does not show a deprivation of any right secured to the accused by law; nor

> does this omission alone show erroneous or harmful procedure.

Powell v. *Alabama* applies "in certain cases." *House* v. *State,* 177 So. 705, 707 (Fla. 1937).

Georgia.—In Georgia another exact duplicate of the present case was presented in the findings of the appellate court. *Gatlin* v. *State,* 17 Ga. App. 406, 407:

> Upon the call of the case the defendant, who was at large under bond, appeared, and the court asked him whether he had counsel to represent him. The defendant stated that he did not have counsel. The court then asked him if he was ready for trial, and the defendant replied that he was; and the court instructed him to strike a jury. The defendant accepted the jury list handed to him, and stated that the first twelve men were acceptable to him. The court failed to appoint counsel to represent the defendant, and failed to instruct him as to his constitutional right to the benefit of counsel, and failed to ask him if he wanted counsel to represent him. * * * it appears that when the court asked him if he was ready for trial, he replied in the affirmative, and proceeded to defend himself, acting as his own counsel; and the record shows that he cross-examined the witnesses with at least ordinary ability and intelligence * * *.

Of these facts, the court held, 407–408:

> The right and privilege of one accused of crime to be defended by counsel is not denied by a mere failure of the court to assign counsel, when it does not appear that counsel is wanted. * * * Where the defendant, as in this case, in answer to a query from the

> court, states that he has no counsel, and in answer to another question from the court replies that he is ready for trial, and makes no request for counsel to be appointed to defend him, but, on the contrary, actively enters into the case as his own lawyer, agreeing upon a jury, cross-examining the witnesses, and making his own statement to the jury, he waives his right to be represented by counsel. While the better practice for the court, on ascertaining that the accused has no counsel, is to ask him if he is able to employ counsel, and if he desires the benefit of counsel, and to acquaint him with his constitutional right in this respect, yet, under the particular facts of this case, and in the absence of any constitutional provision or statute requiring the court to do so, the omission of the court in this respect is not cause for a new trial.

In *Cook* v. *State,* 48 Ga. App. 224, 225 (cited by petitioner, Brief p. 14) the court found that "the evidence in this case was circumstantial; and it was especially important that the defendant have counsel," and ordered a new trial, but in *Bailey* v. *State,* 50 Ga. App. 92, *Cook* v. *State* was distinguished on its facts and *Gatlin* v. *State* was reaffirmed as the rule in Georgia. *Reliford* v. *State,* 140 Ga. 777 (cited by petitioner, Brief, p. 14), is an earlier case in which a defendant in a murder case was forced to trial over objection ten minutes after counsel was appointed and does not relate to the question here.

Illinois.—The rule that assignment of counsel is not required in the absence of a request and showing, in spite of a statute requiring assignment

to indigents, is established by *People* v. *Lavendowski,* 326 Ill. 173, 176:

> Section 9 of article 2 of the constitution provides, in part, as follows: "In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel." Section 2 of division 13 of the Criminal Code provides that "every person charged with crime shall be allowed counsel, and when he shall state upon oath that he is unable to procure counsel, the court shall assign him competent counsel, who shall conduct his defense," etc.
>
> The constitutional provision that a person charged with crime shall have the right to appear and defend by counsel, and the provision of the statute that he shall be allowed counsel or the same shall be appointed for him upon his statement, under oath, that he cannot procure such assistance, does not place upon the court the duty to proffer the services of counsel, * * *

In a decision rendered after but not citing *Powell* v. *Alabama,* it was presumed "that the judge hearing this case in the municipal court did not deny a request for the services of counsel", *People* v. *Parcora,* 358 Ill. 448, 451, though the petitioner alleged that he was ignorant of his rights, asked the court for and was denied an opportunity to secure counsel, and was forced to go to trial unrepresented. *Powell* v. *Alabama* is distinguishable on its facts even in capital cases. *People* v. *Francis, supra,* p. 17.

Indiana.—The rule in Indiana requiring that a request and showing must be made before the court has the duty of appointing counsel, is established in *Marovich* v. *State,* 202 Ind. 274, 277, where the

defendant stated before the trial that he could not get a lawyer and at the close of the evidence asked for a lawyer, saying, "If I get a lawyer, I can present everything to the court." The Supreme Court held:

> It is admitted in appellant's brief that he acted as his own lawyer, and conducted the trial of his case, and that he made no objection save as here shown. If his statement was sufficient request, had it been made before the trial, to warrant the appointment by the court of a lawyer to defend him at the expense of the State, such request having been made at the close of the evidence in defense, it comes too late.

The earlier cases of *Batchelor* v. *State,* 189 Ind. 69, *Bielich* v. *State,* 189 Ind. 127, and *Cassidy* v. *State,* 201 Ind. 311 (all cited by petitioner, Brief, p. 14; petitioner erroneously cites the *Bielich* case as an Illinois case), represent no authority contrary to the rule of the *Marovich* case, *supra,* and are not adverted to in it. The *Batchelor* and *Bielich* cases reversed judgments imposing a death sentence after the defendants had entered guilty pleas and made judicial confessions without either being advised of their rights or the consequences of their pleas and after repeated requests for counsel had been ignored by the officers who had them in custody. In the *Cassidy* case the judge told the defendant he should have a lawyer but that one would not do him any good and proceeded to question him in violation of his right against self-incrimination.

Iowa.—Here the rule is clear that the constitutional guarantee requires an assignment only on request, and that under the statute a showing must

be made. *Korf* v. *Jasper County,* 132 Iowa 682, 685.

> The Constitution guaranties to every person accused of crime, involving his life or liberty, the assistance of counsel. * * * But such assistance cannot be forced upon any one not desiring it, nor is the court required to appoint counsel save upon request. * * *
>
> An analysis of the statute discloses that counsel is to be assigned to assist the defendant, upon three conditions only: (1) When the accused is without counsel; (2) When unable to employ counsel; and (3) Upon the request of the defendant.

Kansas.—That a request and showing are required for assignment by the Constitution and by statute of Kansas is indicated in *State* v. *Moore,* 61 Kan. 732, 734:

> In order that the accused may have the full benefit of this fundamental right, the legislature has provided that when he is about to be arraigned upon a charge of felony, and is without counsel and unable to employ any, it is the duty of the court to appoint counsel to conduct his defense, upon request.

See to same effect *Salina* v. *Cooper,* 45 Kan. 12. The constitutional rule is stated more clearly in a dissenting opinion in the recent case of *State* v. *Oberst,* 127 Kan. 412, 433.

> The constitutional right of the accused to have the assistance of counsel may be waived and a waiver will be implied where the accused, being without counsel, fails to demand that counsel be assigned to him. * * *
>
> There must be a request for, and a denial of, counsel shown to constitute error. A denial will not be presumed.

The majority opinion did not hold to the contrary but held that under the circumstances a boy of 17 should not be permitted to plead guilty to a murder charge without advice as to his rights. The majority admitted (p. 424):

> Without approving or condemning the practice of accepting a plea of guilty on miscellaneous charges of crime without advice of counsel, we can see how mature criminals who know quite well what they are about may be permitted to do so; * * *.

Kentucky.—In Kentucky there is no statute on the subject and the decisions are based entirely on the state constitution. The situation as to the law is therefore quite analogous to the instant case and the facts cited by the Supreme Court in the cases hereinafter quoted are strikingly analogous to the facts presented in the case at bar. Therefore, the decisions in Kentucky holding that no duty is imposed on a trial judge to appoint counsel in the absence of a request and showing are persuasive as to the applicable law here. In *Grogan* v. *Commonwealth,* 222 Ky. 484, 485, the court said:

> Usually the court is not required to assign counsel to the accused unless he requests it and shows that he is financially unable to employ counsel. * * * The record is silent as to what occurred when appellant undertook to conduct his own defense * * *. He displayed considerable ability in interrogating the witnesses, and there is no showing whatever that he was so mentally deficient or so ignorant of his rights as to require the interposition of the court in his behalf. In the absence of such a

showing, or of a request for counsel, we cannot say that the court erred in not appointing counsel.

In *Holland* v. *Commonwealth,* 241 Ky. 813, 817–818, an even more recent case, the court said:

> * * * Although it is true that the Constitution guarantees to the accused in all criminal prosecutions the right to be heard by himself and counsel, it is not the duty of the court to assign counsel to the accused unless he requests it, and shows that he is financially unable to employ counsel, or lacks sufficient mental capacity to conduct the defense, or to understand its nature. *Grogan* v. *Commonwealth,* 222 Ky. 484, 1 S. W. (2d) 779. The record does not disclose what occurred when appellant undertook to conduct his own defense. For aught that appears, he may have stated that he did not desire counsel. At any rate, he elected to conduct his own defense. Doubtless it is true that appellant's ability was not equal to that of a well-trained lawyer, but not only did he cross-examine the witnesses as to his own identity and the identity of the money taken from the bank, but he had sufficient intelligence and assurance to argue his own case to the jury, and there is no showing whatever that he was so mentally deficient or so ignorant of his rights as to require the interposition of the court in his behalf. In the absence of such a showing, or a request for counsel, we cannot say that the court erred in not appointing counsel. The case is simply one where the accused, being a man of at least average intelligence, as disclosed by the record, elected to conduct his own defense, and therefore will be held bound by his election. Furthermore, it is not possible to perceive how the jury could have reached

> a different verdict if appellant had employed, or the court had appointed, the best attorney in the state to defend him, and he had assisted in the selection of the jury, had subjected the witnesses to the severest cross-examination, and had succeeded in excluding the confession.

Cass v. *Commonwealth,* 236 Ky. 462 (cited by petitioner, Brief, p. 14), was a capital case in which counsel was refused time to prepare the defense. The court is under the duty to assign counsel in capital cases. *Fugate* v. *Commonwealth,* 254 Ky. 663 (citing *Powell* v. *Alabama*).

Louisiana.—The law in Louisiana is equally clear. In *State* v. *Davis,* 171 La. 449, 451, the court said:

> It is true the Constitution declares that in all criminal prosecutions the accused shall enjoy the right to have counsel to assist him in his defense, but it has never been considered the mandatory duty of the court to provide counsel for an accused where he has not secured counsel for himself and has made no request for the court to assign him counsel.

That this is the rule even though a statute requires the assignment of counsel on the defendant's request is held in *State* v. *Satcher,* 124 La. 1015, and *State* v. *Williams,* 162 La. 590. In the former the court said (p. 1020): "* * * the court was under no obligation to make the assignment until the request had been made." See to the same effect *State* v. *Murry,* 165 La. 653; *State* v. *De Sarrant,* 33 La. Ann. 979; *State* v. *Whitesides,* 49 La. Ann. 352. This rule is recognized by *Perkins* v. *Sheriff,* 23 F. (2d) 892 (D. C. La.), where the court said:

"* * * the Supreme Court of Louisiana has held that the court does not have to appoint counsel unless asked for by the accused; * * *" That the failure to request an assignment constitutes a waiver was held in *State* v. *Kelly,* 25 La. Ann. 381, in which the court said (p. 382):

> * * * inasmuch as when brought to the bar in the custody of the sheriff, as appears from the record, he was ready for his trial, we must presume that if he had no counsel, and did not ask the court to assign him one, he chose to be heard in his own defense.

Massachusetts.—Here, there is no applicable statute except in capital cases (Gen. Laws, 1932, Ch. 277, Sec. 47). That the Massachusetts Constitution, which preserves to the accused the "* * * right * * * to be fully heard in his defence by himself or his counsel, at his election * * *" (Mass. Const., 1780, Part I, Art. 12), does not require an assignment is held in *McDonald* v. *Commonwealth,* 173 Mass. 322, and *Conant* v. *Burnham,* 133 Mass. 503, 506. In the former case the court said (p. 327):

> * * * there is no constitutional provision in this State guaranteeing counsel to a prisoner, and no statutory provision in respect to counsel except in the case of an indictment for a capital crime.

To same effect see *Commonwealth* v. *Millen,* 289 Mass. 441 (citing *Powell* v. *Alabama*), certiorari denied, 295 U. S. 765. This rule was recognized by a federal court, *Wilson* v. *Lanagan,* 19 F. Supp. 870 (D. C. Mass.), where the court said (pp. 872–873):

> If every criminal trial, held without the aid of a defendant's attorney, is a want of due

process, then the established practice in this Commonwealth would have to be materially revised.

Michigan.—This State has a statute which permits the court to appoint counsel at public expense for an indigent defendant. But even with such a statute the Supreme Court has held that neither the Constitution nor the statute imposes an obligation to appoint counsel in the absence of a request. In *People* v. *Williams,* 225 Mich. 133, 137–138, the court said:

> An accused is not entitled, as of right, to have counsel assigned by the court to advise him relative to his plea. The State Constitution, art. 2, § 19, secures to an accused the right "to have counsel for his defense." This does not mean he shall have counsel at public expense. It is a guaranty of right to employ and have counsel; * * * This is * * * on a par with the right to produce witnesses and proofs * * * Section 15912, 3 Comp. Laws 1915, permits the court to appoint an attorney at public expense to conduct the defense of an accused when he is unable to procure counsel. This statute is permissive; its provisions require a showing of inability of an accused to procure counsel, * * * The record discloses no application by defendants for counsel during the period their pleas of not guilty stood, or at any other time, and there is no merit in the claim that counsel should have been appointed to represent them.

Again in a recent case the court held, *People* v. *Crandell,* 270 Mich. 124, 127:

> The law affords an accused the benefit of counsel if he so desires; of his own selection

if employed by him, and by the court if he is without means and so requests.

Minnesota.—Here, a statute requires that the court may not receive a plea of guilty unless the accused is represented by counsel and if he has no counsel the court must appoint one (Gen. Stat. 1923, Sec. 10667). In *State* v. *McDonnell,* 165 Minn. 423, 426, the court held that the statute was substantially complied with when a 17-year-old boy entered a plea to a felony charge in the following manner (p. 425):

> The court: Have you any attorney?
> The defendant: No, sir.
> The court: Do you wish to have one, or are you ready to enter a plea?
> The defendant: To plead.

Mississippi.—The rule here is that the constitution imposes no duty to assign counsel. *Reed* v. *State,* 143 Miss. 686, 689, in which the court held:

> It is not the law that the state must furnish counsel to persons charged with crime, except in capital cases. In all other cases the defendant must procure counsel or act for himself in his trial. The court has no power to employ counsel to be furnished him.

To the same effect see *Dugan* v. *State,* 151 Miss. 781. Cf. *Schwartz* v. *State,* 103 Miss. 711; *Brown* v. *State,* 173 Miss. 542, reversed, 297 U. S. 278.

Missouri.—Under a statute that requires assignment of counsel to an indigent defendant, the rule of Missouri is that not only must a request be made but a showing of inability to employ counsel. *State* v. *Steelman,* 318 Mo. 628; *State* v. *Miller,* 292 S. W.

440 (Mo. Sup.); *State* v. *Terry,* 201 Mo. 697; *State* v. *Moore,* 121 Mo. 514. In the first case the court held (pp. 631–632):

> * * * before appointing or assigning counsel for a defendant charged with a felony the trial court must find three things: first, that the defendant is without counsel; second, that he has requested the court to appoint counsel for him; and third, that *he is unable to employ counsel.* * * * While, as above indicated, it is shown by the record in this case that appellant was without counsel and, also, that he requested the court to appoint council for him, the record fails to show that *he was unable to employ counsel.* * * * Being able to employ counsel, it was not the duty of the court to appoint counsel for him, even though he did request it. [Italics in original.]

That a failure to make the request constitutes a waiver of the right is held in *State* v. *Terry, supra* (pp. 700–701):

> Section 2560, Revised Statutes 1899, provides: "If any person about to be arraigned upon an indictment for a felony be without counsel to conduct his defense, and be unable to employ any, it shall be the duty of the court to assign him counsel, at his request, not exceeding two, who shall have free access to the prisoner at all reasonable hours."
>
> It will be noticed from this statute that three things are necessary to be found by the trial court before appointing or assigning counsel for a defendant charged with felony: first, that the defendant is without

> counsel; second, that he is unable to employ counsel; third, that the defendant has requested that counsel be appointed for him. This record does not show that defendant requested the court to appoint counsel for him, but it does disclose that the court found that he was able to employ counsel. Defendant being able to employ counsel, it was not the duty of the court to appoint counsel for him, even though he had requested it. Besides, his failure to make such a request was a waiver of his statutory right.

Montana.—The rule here is that a request for counsel must be denied to constitute a violation of the constitutional right, *State* v. *Fowler,* 59 Mont. 346, where the court said (pp. 353–354):

> * * * the defendant stated that he was without counsel to defend him. The court explained to him that he had had ample time to obtain counsel and he must proceed with the trial.
>
> It will be noted that the defendant did not ask time to procure counsel, but merely stated that he was without counsel. Under the circumstances we do not think the court deprived him of any constitutional right, as counsel contends. * * * The Constitution guarantees every defendant the right to be heard by himself, as well as by counsel. * * * The right to appear by counsel is a personal privilege to be availed of by the accused at his pleasure, * * *
>
> Under these circumstances we think nothing short of a refusal of an application to the court by the defendant for time to procure counsel, disclosing a substantial reason why he has not done so, would be a sufficient reason to justify a conclusion that

the court has violated his constitutional rights.

Nebraska.—No cases on the exact point are found in Nebraska but it is clear that the constitutional right to counsel may be waived. *Bordeau* v. *State,* 125 Neb. 133; *Smythe* v. *State,* 124 Neb. 267.

Nevada.—In Nevada it was held that the denial of requests repeatedly made at and during the trial was not error, when the defendant had waived counsel at the arraignment some period earlier. *State* v. *MacKinnon,* 41 Nev. 182. The court said (pp. 187–188):

> The purpose of this provision in our constitution is simply to guarantee to one charged with crime the privilege of being defended by counsel. * * * If he waives it at one stage of the proceeding, he must act with a reasonable degree of diligence if he later desires to avail himself of it. * * * * * * The defendant had ample opportunity to engage counsel, and his failure to do so was due to his own neglect.

New Jersey.—In New Jersey the rule is that there is no denial of the constitutional right to counsel unless the record affirmatively shows the denial of a request. *State* v. *Raney,* 63 N. J. Law 363; *State* v. *Murphy,* 87 N. J. Law 515. In the former case the court said (p. 365):

> The right and privilege in question in this case is thus capable of being waived. In the absence in the record and proceedings of any indication that the accused desired the assistance of counsel and was denied it, it will be presumed that he failed to ask that counsel be assigned for his defense, and chose to defend himself. The right and

> privilege is not denied by mere failure to assign counsel.

New York.—In New York no decision has been found on analagous circumstances. However, a decision which preceded any statutes in that state on the subject indicates that the *right* to assign counsel does not flow from any *authority* or *duty* imposed by the constitution. *Hadley* v. *Albany County,* 28 How. Prac. 22, 24, in which the court said:

> I have not been able to find any statute of this state, which under the most liberal construction, directs or even authorizes the court to assign counsel to defend prisoners, or that provides any compensation, or prescribes any mode of payment for such service. It was insisted upon the argument that such authority was to be found in the constitution of this state. The seventh article and seventh section of the constitution provides as follows: "And in every trial on impeachment or indictment, the party accused *shall be allowed counsel as in civil actions.* The obvious construction of this provision is, that a prisoner may have the assistance of counsel in conducting a defence, not that the court shall provide such counsel at the expense of the county. [Italics in original.]

That the right to assign counsel is established by practice is seen in *People Ex Rel. Saunders* v. *Supervisors of Erie County,* 1 Sheld. (N. Y.) 517, 524. In a late case the following language is found, *People* v. *Price,* 262 N. Y. 410, 413, affirmed 263 N. Y. 617:

> Where, therefore, a defendant upon arraignment or at any other stage of the proceeding, * * * appears without counsel

and desires the aid of counsel, the court must assign an attorney to defend him.

North Dakota.—No case on the exact question is found in North Dakota. In two cases, however, the Supreme Court affirmed denials of applications to withdraw pleas of guilty to charges of murder made after waiver of counsel. *State* v. *Throndson,* 49 N. D. 348; *State* v. *Layer,* 48 N. D. 366.

Ohio.—In Ohio an assigned attorney refused to serve, whereupon the defendant acted for himself. The appellate court held that the trial court should have appointed another counsel on the grounds that the defendant was mentally defective. *Stephenson* v. *State,* 4 Ohio App. 128, 129 (Cited by petitioner, Brief, p. 14).

Oklahoma.—In Oklahoma it is required by statute that the court must ask an unrepresented defendant if he desires the aid of counsel. (Comp. Stat. 1921, Sec. 2590); *Cerday* v. *State,* 39 Okla. Cr. Rep. 153; *Polk* v. *State,* 26 Okla. Cr. Rep. 283; *Baker* *State,* 9 Okla. Cr. Rep. 62. Cf. *Ex Parte Hollins,* 54 Okla., Cr. Rep. 70; *Dumas* v. *State,* 54 Okla. Cr. Rep. 207; *Prescott* v. *State,* 56 Okla. Cr. Rep. 259, 268, distinguishing *Powell* v. *Alabama.*

Oregon.—An Oregon statute requires that a defendant be informed of his constitutional rights at the arraignment. A judgment and sentence to the death penalty, largely obtained through a confession taken by a deputy District Attorney who declined a request for counsel made by the accused before he confessed, was affirmed. *State* v. *Butchek,* 121 Ore. 141. The Court held that the statute did not apply to officials.

Pennsylvania.—This is the only State which, in the absence of statute, requires that an accused be

advised of his right to counsel. The cases cited by petitioner (Brief, p. 14) are to that point. *Commonwealth* v. *Cohen*, 123 Pa. Super. 5; *Commonwealth* v. *Valerio*, 118 Pa. Super. 34; *Commonwealth* v. *Richards*, 111 Pa. Super. 124 (the latter of which cited *Powell* v. *Alabama*). No cases are found on the specific question whether counsel must be assigned in the absence of request.

South Carolina.—The rule in South Carolina is clear. The Supreme Court said in the recent case of *State* v. *Jones*, 172 S. C. 129, 130:

> Neither of the appellants was represented by counsel, and, under the law, it was not required by the Court to assign counsel for them.

South Dakota.—In South Dakota the court is required by statute to inform an accused of his right to counsel and to ask if he desires the aid of counsel. Rev. Code, 1919, Sec. 4755. Of the constitutional provision, however, the court said, in denying an appeal from an order denying an application for assignment of counsel to take an appeal from a judgment of conviction, *State* v. *Sweeney*, 48 S. D. 248, 251:

> Section 7 of article 6 of our Constitution merely means that the prisoner may have the assistance of counsel in conducting his defense, not that the court shall provide such counsel at the expense of the county.

Texas.—In Texas in a non-capital case there is no duty to assign counsel even on the defendant's request. *Gilley* v. *State*, 114 Tex. Cr. App. 548; *Brady* v. *State*, 122 Tex. Cr. App. 275. In the latter case the court said (p. 278):

> He was not charged in the indictment with an offense which could be punished by the infliction of the death penalty, and for that reason the court was not required by law to appoint counsel for him.

In *Faggett* v. *State*, 122 Tex. Cr. App. 399, 403, the court said:

> In a felony case less than capital, the law does not make the presence of an attorney essential. It recognizes the right of the accused to be represented by counsel, but imposes upon him the duty of using diligence in securing representation.

To the same effect see *Holden v. State,* 89 Tex. Cr. App. 628; *Cooke v. State,* 95 Tex. Cr. App. 553; *Cummings* v. *State,* 104 Tex. Cr. App. 117; *Brown* v. *State,* 118 Tex. Cr. App. 582. The language of the court in *Sowells* v. *State,* 99 Tex. Cr. App. 465, 468, in holding that no prejudice resulted to the defendant from the absence of an attorney, is applicable to the instant case:

> In a felony case of less than capital, the law does not make the presence of an attorney essential. It recognizes the right of the accused to be represented by counsel, but it imposes upon him the duty of using diligence in securing their services. In the motion there is nothing revealing what would have been done had the attorney been present other than that which was done. * * * No suggestion is made in the motion of any evidence that might have been produced in his favor. Neither does it show that any improper evidence against him was received. As we comprehend it, a reversal is sought solely because the appellant was not represented by an attorney. This position this court cannot sanction.

See to same effect *Fuller* v. *State*, 117 Tex. Cr. App. 558. Even in a capital case where a statute provides for an assignment of counsel, the court held in *Ex Parte Rodriquez*, 118 Tex. Cr. App. 179, 181:

> However, even in capital cases no imperative duty to appoint counsel is upon the trial court, and it only becomes his duty when the court is apprised of the fact that the accused is too poor to employ counsel.

See to the same effect *McKee* v. *State*, 118 Tex. Cr. App. 479.

Utah.—Here, although there is a statute requiring assignment of counsel on the request of an indigent defendant (Comp. Laws, 1917, Sec. 8871), the Supreme Court has held that the right thus given is not constitutional. In *Pardee* v. *Salt Lake County*, 39 Utah 482, 488, the court said:

> It may be said, therefore, that there is at least no constitutional warrant for appointing an attorney to defend in criminal cases.

See *State* v. *Fairclough*, 86 Utah 326, distinguishing *Powell* v. *Alabama* on its facts, particularly in that it applied to a capital case.

Vermont.—The only case in Vermont involves an effort on the part of a defendant to invoke the statute providing for compensation of assigned counsel by an affidavit alleging his indigence. *State* v. *Gomez*, 89 Vt. 490, 496, in which the court said:

> The claim of respondent's counsel that under Article 10 of the Constitution of Vermont it was the duty of the court to assign counsel at the State's expense is without merit.

Virginia.—The rule is established in Virginia that even in a capital case where the sentence is to the death penalty, the record must show an affirmative denial by the court of the right to counsel before it will be held that the constitutional right has been violated. In *Barnes* v. *Commonwealth*, 92 Va. 794, 803, where a woman was convicted and sentenced to be hanged, the court said:

> The record does not show whether she had counsel or not; but if it showed that she did not have counsel, unless it appeared that she was denied that right, it would not be ground for reversing the judgment. * * *
>
> If a prisoner is unable to employ counsel, the court may appoint some one to defend him, * * *. But we cannot presume that the trial court denied the prisoner her right to have counsel, * * *

In *Riddick* v. *Commonwealth*, 135 Va. 724, 727, where the defendant, who was convicted of murder and sentenced to the death penalty, contended on appeal that he had had no counsel below and alleged prejudice from such lack of assistance, the court followed the rule of *Barnes* v. *Commonwealth, supra*, saying (p. 727):

> The accused was confined * * * for many months, in which he and his friends might have secured counsel and ordered subpoenas for witnesses in his behalf.
>
> * * * It is not contended that the accused was *denied* the right to have counsel. [Italics in original.]

Washington.—No case is found in this State on the exact question. See *State* v. *Bradley*, 175 Wash. 481, denying the applicability of *Powell* v. *Alabama*; *State* v. *Hardung*, 161 Wash. 379; *Presby* v. *Klickitat County*, 5 Wash. 329.

West Virginia.—In West Virginia a ruling on the exact question is found in a case factually analogous to the case at bar. In *State* v. *Yoes,* 67 W. Va. 546, 547, the court said:

> The order shows no appearance by attorney and yet it says both parties announced themselves ready for trial. Hence it is clear, not only that she appeared in her own proper person, but also that she appeared for the purposes of the trial.
>
> * * * The right to have counsel is a mere privilege guaranteed by the constitution. * * * No invasion of this guaranty is disclosed, therefore, unless a request for the assistance of counsel appears by the record to have been denied by the court.

See to the same effect *State* v. *Kellison,* 56 W. Va. 690, 692–693, a murder case. Withdrawal of the plea of guilty made without the advice of counsel was denied in *State* v. *Hill,* 81 W. Va. 676, and *State* v. *Stevenson,* 67 W. Va. 553.

Wisconsin.—There is no clear rule on the question in Wisconsin. In *Hopper* v. *Ashland County,* 84 Wis. 655, the Circuit Court held that it had no jurisdiction to appoint counsel on the application of an indigent defendant. The Supreme Court did not rule on such power, but held that the appointment in that case was not sufficiently clear to render the expense of defense counsel a charge against the county. It had been previously held in *Carpenter* v. *Dane,* 9 Wis. 274, 278, and *County* v. *Smith,* 13 Wis. 585, that even in the absence of a statute the county was obligated to pay counsel assigned for defendants clearly indigent. A defendant in a murder case was held bound by his waiver of counsel in *Dietz* v. *State,* 149 Wis. 462, 479–480.

Wyoming.—The rule is clear in Wyoming that the court is not required to assign counsel in the absence of a request. It was established in *James* v. State, 27 Wyo. 378, 384, that:

> The right, or privilege, to defend by counsel, * * * may be waived or renounced, and it is not denied by a mere failure to assign counsel. There is no invasion of it disclosed, unless it appear by the record that a request for assignment of counsel was denied by the court.

Philippine Islands.—That no assignment is required in the absence of a request is held in *United States* v. *Go-Leng,* 21 Phil. Rep. 426, 428–429:

> * * * Accused persons are undoubtedly entitled to appoint an attorney to defend them at trial, or to have one appointed *de officio,* should they ask for one and not possess the necessary means to employ an attorney of their own. But it devolves exclusively upon them to avail themselves of this right. It is one which they are perfectly entitled to waive and they may defend themselves in person. The law expressly authorizes them, as it could not but do, to defend themselves in person, without the assistance of counsel. (Sec. 15, General Orders, No. 58.) It is understood, of course, that they waive their right to be assisted by counsel when they not only do not appoint or request one, but voluntarily submit to trial, and especially when they actually exercise therein the right of defense by cross-examining the witnesses for the prosecution and by introducing evidence in their own behalf, as was done in the present case.

APPENDIX B

DEPARTMENT OF JUSTICE,
Washington, D. C., March 4, 1937.

CIRCULAR NO. 2946

To all United States attorneys:

Certain cases have arisen recently indicating that in some instances the District Courts do not appoint counsel for defendants in criminal cases who appear without an attorney, unless the defendant expressly requests such appointment. In most of the Districts, however, it is customary to appoint counsel in each case in which the defendant has not retained counsel, unless he expressly states that he wishes to conduct his own defense.

It would seem that the latter procedure is the better practice. When in any given case such practice is not followed, you are directed to bring the matter to the attention of the court, in order that the defendant may have the assistance of counsel for his defense. In the case of *Powell* v. *Alabama*, 287 U. S. 45, the Court said:

> The necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment.

These words would apply with equal force to the Fifth Amendment. While it may be that the right "to have the assistance of counsel for his defense," which is guaranteed by the Sixth Amendment, may be waived, and while it may be that the practice followed in most of the jurisdictions is more than

a compliance with the constitutional requirement, the Department of Justice is under a particular obligation to see that no man who needs counsel is without such assistance.

HOMER CUMMINGS,
Attorney General.

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SUPREME COURT OF THE UNITED STATES.

No. 699.—October Term, 1937.

John A. Johnson, Petitioner, *vs.* Fred G. Zerbst, Warden, United States Penitentiary, Atlanta, Georgia.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 23, 1938.]

Mr. Justice Black delivered the opinion of the Court.

Petitioner, while imprisoned in a Federal penitentiary, was denied *habeas corpus* by the District Court.[1] Later, that court granted petitioner a second hearing, prompted by "the peculiar circumstances surrounding the case and the desire of the court to afford opportunity to present any additional facts and views which petitioner desired to present." Upon consideration of the second petition, the court found that it did "not substantially differ from the" first, "and for the reasons stated in the decision in that case" the second petition was also denied.

Petitioner is serving sentence under a conviction in a United States District Court for possessing and uttering counterfeit money. It appears from the opinion of the District Judge denying *habeas corpus* that he believed petitioner was deprived, in the trial court, of his constitutional right under the provision of the Sixth Amendment that "In all criminal prosecutions, the accused shall enjoy the right . . . . to have the Assistance of Counsel for his defence."[2] However, he held that proceedings depriving petitioner of his constitutional right to assistance of Counsel

[1] 13 Fed. Supp. 253.

[2] The Sixth Amendment of the Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

were not sufficient "to make the trial void and justify its annulment in a habeas corpus proceeding, but that they constituted trial errors or irregularities which could only be corrected on appeal."

The Court of Appeals affirmed[3] and we granted certiorari due to the importance of the questions involved.[4]

The record discloses that:

Petitioner and one Bridwell were arrested in Charleston, South Carolina, November 21, 1934, charged with feloniously uttering and passing four counterfeit twenty-dollar Federal Reserve notes and possessing twenty-one such notes. Both were then enlisted men in the United States Marine Corps, on leave. They were bound over to await action of the United States Grand Jury, but were kept in jail due to inability to give bail. January 21, 1935, they were indicted; January 23, 1935, they were taken to court and there first given notice of the indictment; immediately were arraigned, tried, convicted and sentenced that day to four and one-half years in the penitentiary; and January 25, were transported to the Federal Penitentiary in Atlanta. While Counsel had represented them in the preliminary hearings before the commissioner in which they—some two months before their trial—were bound over to the Grand Jury, the accused were unable to employ Counsel for their trial. Upon arraignment, both pleaded not guilty, said that they had no lawyer, and—in response to an inquiry of the court—stated that they were ready for trial. They were then tried, convicted and sentenced, without assistance of Counsel.

"Both petitioners lived in distant cities of other states and neither had relatives, friends, or acquaintances in Charleston. Both had little education and were without funds. They testified that they had never been guilty of nor charged with any offense before, and there was no evidence in rebuttal of these statements."[5] In the *habeas corpus* hearing, petitioner's evidence developed that no request was directed to the trial judge to appoint Counsel, but that such request was made to the District Attorney, who replied that in the State of trial (South Carolina) the court did not appoint Counsel unless the defendant was charged with a capital crime. The District Attorney denied that petitioner made request

[3] 92 F. (2d) 748.

[4] 302 U. S. —.

[5] Opinion of the District Judge, 13 Fed. Supp. 253, 254.

to him for Counsel or that he had indicated petitioner had no right to Counsel. The Assistant District Attorney testified that Bridwell "cross examined the witnesses;" and, in his opinion, displayed more knowledge of procedure than the normal layman would possess. He did not recall whether Bridwell addressed the jury or not, but the clerk of the trial court testified "that Mr. Johnson [Bridwell?] conducted his defence about as well as the average layman usually does in cases of a similar nature." Concerning what he said to the jury and his cross examination of witnesses, Bridwell testified: "I tried to speak to the jury after the evidence was in during my trial over in the Eastern District of South Carolina. I told the jury, 'I don't consider myself a hoodlum as the District Attorney has made me out several times.' I told the jury that I was not a native of New York as the District Attorney stated, but was from Mississippi and only stationed for government service in New York. I only said fifteen or twenty words. I said I didn't think I was a hoodlum and could not have been one of very long standing because they didn't keep them in the Marine Corps.

"I objected to one witness' testimony. I didn't ask him any questions, I only objected to his whole testimony. After the prosecuting attorney was finished with the witness, he said, 'Your witness,' and I got up and objected to the testimony on the grounds that it was all false, and the Trial Judge said any objection I had I would have to bring proof or disproof."

Reviewing the evidence on the petition for *habeas corpus*, the District Court said[6] that, after trial, petitioner and Johnson " . . . were remanded to jail, where they asked the jailer to call a lawyer for them, but were not permitted to contact one. They did not, however, undertake to get any message to the judge.

" . . . January 25th, they were transported by automobile to the Federal Penitentiary in Atlanta, Ga., arriving . . . the same day.

"There, as is the custom, they were placed in isolation and so kept for sixteen days without being permitted to communicate with any one except the officers of the institution, but they did see the officers daily. They made no request of the officers to be permitted to see a lawyer, nor did they ask the officers to present to the trial judge

[6] 13 Fed. Supp. 253, 254.

a motion for new trial or application for appeal or notice that they desired to move for a new trial or to take an appeal.

"On May 15, 1935, petitioners filed applications for appeal which were denied because filed too late."

The " . . . time for filing a motion for new trial and for taking an appeal has been limited to three and five days."[7]

One. The Sixth Amendment guarantees that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." This is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. Omitted from the Constitution as originally adopted, provisions of this and other Amendments were submitted by the first Congress convened under that Constitution as essential barriers against arbitrary or unjust deprivation of human rights. The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not "still be done."[8] It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned Counsel. That which is simple, orderly and necessary to the lawyer—to the untrained layman—may appear intricate, complex and mysterious. Consistently with the wise policy of the Sixth Amendment and other parts of our fundamental charter, this Court has pointed to " . . . the humane policy of the modern criminal law . . ." which now provides that a defendant " . . . if he be poor, . . . may have counsel furnished him by the state . . . not infrequently . . . more able than the attorney for the state."[9]

The " . . . right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evi-

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[7] 13 Fed. Supp. at 256; see, Rules of ~~the Supreme Court of the United States, No. 42.~~ → Practice and Procedure (Criminal Appeals Rules), adopted May 7, 1934, II, III.

[8] Cf., Palko *v.* Connecticut, 302 U. S. 319, 325.

[9] Patton *v.* United States, 281 U. S. 276, 308.

dence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him."[10] The Sixth Amendment withholds from Federal Courts,[11] in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of Counsel.

Two. There is insistence here that petitioner waived this constitutional right. The District Court did not so find. It has been pointed out that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights[12] and that we "do not presume acquiescence in the loss of fundamental rights."[13] A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to Counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

Patton v. *United States,* 281 U. S. 276, decided that an accused may, under certain circumstances, consent to a jury of eleven and waive the right to trial and verdict by a constitutional jury of twelve men. The question of waiver was there considered on direct appeal from the conviction, and not by collateral attack on *habeas corpus.* However, that decision may be helpful in indicating how, and in what manner, an accused may—before his trial results in final judgment and conviction—waive the right to assistance of Counsel. The *Patton* case noted approvingly a state court decision[14] pointing out that the humane policy of modern criminal law had altered conditions which had existed in the "days when

[10] Powell *v.* Alabama, 287 U. S. 45, 68, 69.

[11] Cf., Barron *v.* The Mayor, etc., 7 Pet. 243, 247; Edwards *v.* Elliott, 21 Wall. 532, 557.

[12] Aetna Insurance *v.* Kennedy, 301 U. S. 389, 393; Hodges *v.* Easton, 106 U. S. 408, 412.

[13] Ohio Bell Telephone Co. *v.* Public Utilities Commission, 301 U. S. 292, 307.

[14] Hack *v.* State, 141 Wisconsin 346, 351.

the accused could not testify in his own behalf, [and] was not furnished Counsel," and which had made it possible to convict a man when he was "without money, without counsel, without ability to summon witnesses and not permitted to tell his own story, . . ."

The constitutional right of an accused to be represented by Counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without Counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to Counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.

Three. The District Court, holding petitioner could not obtain relief by *habeas corpus*, said:

"It is unfortunate, if petitioners lost their right to a new trial through ignorance or negligence, but such misfortune cannot give this Court jurisdiction in a habeas corpus case to review and correct the errors complained of."

The purpose of the constitutional guaranty of a right to Counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution. True, *habeas corpus* cannot be used as a means of reviewing errors of law and irregularities—not involving the question of jurisdiction—occurring during the course of trial;[15] and the "writ of *habeas corpus* cannot be used as a writ of error.[16] These principles, however, must be construed and applied so as to preserve—not destroy—constitutional safeguards of human life and liberty. The scope of inquiry in *habeas corpus* proceedings has been broadened—not narrowed—since the adoption of the Sixth Amendment. In such a proceeding, "it would be clearly erroneous to confine the inquiry to the proceedings and judgment of the trial court"[17] and the petitioned court has "power to inquire with regard to the jurisdiction of the inferior court,

[15] Cf., Ex parte Watkins, 3 Pet. 193; Knewal v. Egan, 268 U. S. 442; Harlan v. McGourin, 218 U. S. 442.

[16] Woolsey v. Best, 299 U. S. 1, 2.

[17] Frank v. Mangum, 237 U. S. 309, 327.

either in respect to the subject matter or to the person, even if such inquiry . . . . [involves] an examination of facts outside of, but not inconsistent with, the record."[18] Congress has expanded the rights of a petitioner for *habeas corpus*[19] and the " . . . effect is to substitute for the bare legal review that seems to have been the limit of judicial authority under the common-law practice, and under the Act of 31 Car. II, c. 2, a more searching investigation, in which the applicant is put upon his oath to set forth the truth of the matter respecting the causes of his detention, and the court, upon determining the actual facts, is to 'dispose of the party as law and justice require.'

"There being no doubt of the authority of the Congress to thus liberalize the common law procedure on *habeas corpus* in order to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution or a law or treaty established thereunder, it results that under the sections cited a prisoner in custody pursuant to the final judgment of a state court of criminal jurisdiction may have a judicial inquiry in a court of the United States into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the state court to proceed to a judgment against him. . . .

" . . . it is open to the courts of the United States upon an application for a writ of *habeas corpus* to look beyond forms and inquire into the very substance of the matter, . . ."[20]

Petitioner, convicted and sentenced without the assistance of Counsel, contends that he was ignorant of his right to Counsel, and incapable of preserving his legal and constitutional rights during trial. Urging that—after conviction—he was unable to obtain a lawyer; was ignorant of the proceedings to obtain new trial or appeal and the time limits governing both; and that he did not possess the requisite skill or knowledge properly to conduct an appeal, he says that it was—as a practical matter—impossible for him to obtain relief by appeal. If these contentions be true in

[18] In re Mayfield, 141 U. S. 107, 116; Cuddy, Petitioner, 131 U. S. 280.

[19] 28 U. S. C., ch. 14, Sec. 451, *et seq.*

[20] Frank *v.* Mangum, *supra*, 330, 331; cf., Moore *v.* Dempsey, 261 U. S. 86; Mooney *v.* Holohan, 294 U. S. 103; Hans Nielsen, Petitioner, 131 U. S. 176.

fact, it necessarily follows that no legal procedural remedy is available to grant relief for a violation of constitutional rights, unless the courts protect petitioner's rights by *habeas corpus.* Of the contention that the law provides no effective remedy for such a deprivation of rights affecting life and liberty it may well be said—as in *Mooney* v. *Holohan,* 294 U. S. 103, 113—that it "falls with the premise." To deprive a citizen of his only effective remedy would not only be contrary to the "rudimentary demands of justice"[21] but destructive of a constitutional guaranty specifically designed to prevent injustice.

Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of Counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a Federal court's authority to deprive an accused of his life or liberty. When this right is properly waived, the assistance of Counsel is no longer a necessary element of the court's jurisdiction to proceed to conviction and sentence. If the accused, however, is not represented by Counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. A court's jurisdiction at the beginning of trial may be lost "in the course of the proceedings" due to failure to complete the court—as the Sixth Amendment requires—by providing Counsel for an accused who is unable to obtain Counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake.[22] If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by *habeas corpus.*[23] A judge of the United States—to whom a petition for *habeas corpus* is addressed—should be alert to examine "the facts for himself when if true as alleged they make the trial absolutely void."[24]

It must be remembered, however, that a judgment can not be lightly set aside by collateral attack, even on *habeas corpus.* When

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[21] Cf., Mooney *v.* Holohan, *supra,* 112.

[22] Cf., Frank *v.* Mangum, *supra,* 327.

[23] Hans Neilsen, Petitioner, *supra.*

[24] Cf., Moore *v.* Dempsey, 261 U. S. 86, 92; Patton *v.* United States, 281 U. S. 276, 312, 313.

collaterally attacked, the judgment of a court carries with it a presumption of regularity.[25] Where a defendant, without Counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of *habeas corpus*, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to assistance of Counsel. If in a *habeas corpus* hearing, he does meet this burden and convinces the court by a preponderance of evidence that he neither had Counsel nor properly waived his constitutional right to Counsel, it is the duty of the court to grant the writ.

In this case, petitioner was convicted without enjoying the assistance of Counsel. Believing *habeas corpus* was not an available remedy, the District Court below made no findings as to waiver by petitioner. In this state of the record we deem it necessary to remand the cause. If—on remand—the District Court finds from all of the evidence that petitioner has sustained the burden of proof resting upon him and that he did not competently and intelligently waive his right to Counsel, it will follow that the trial court did not have jurisdiction to proceed to judgment and conviction of petitioner, and he will therefore be entitled to have his petition granted. If petitioner fails to sustain this burden, he is not entitled to the writ.

The cause is reversed and remanded to the District Court for action in harmony with this opinion.

Reversed.

Mr. Justice REED concurs in the reversal.

Mr. Justice MCREYNOLDS is of opinion that the judgment of the court below should be affirmed.

Mr. Justice BUTLER is of the opinion that the record shows that petitioner waived the right to have counsel, that the trial court had jurisdiction, and that the judgment of the Circuit Court of Appeals should be affirmed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

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[25] Cuddy, Petitioner, *supra*.